

Contracting for FMS



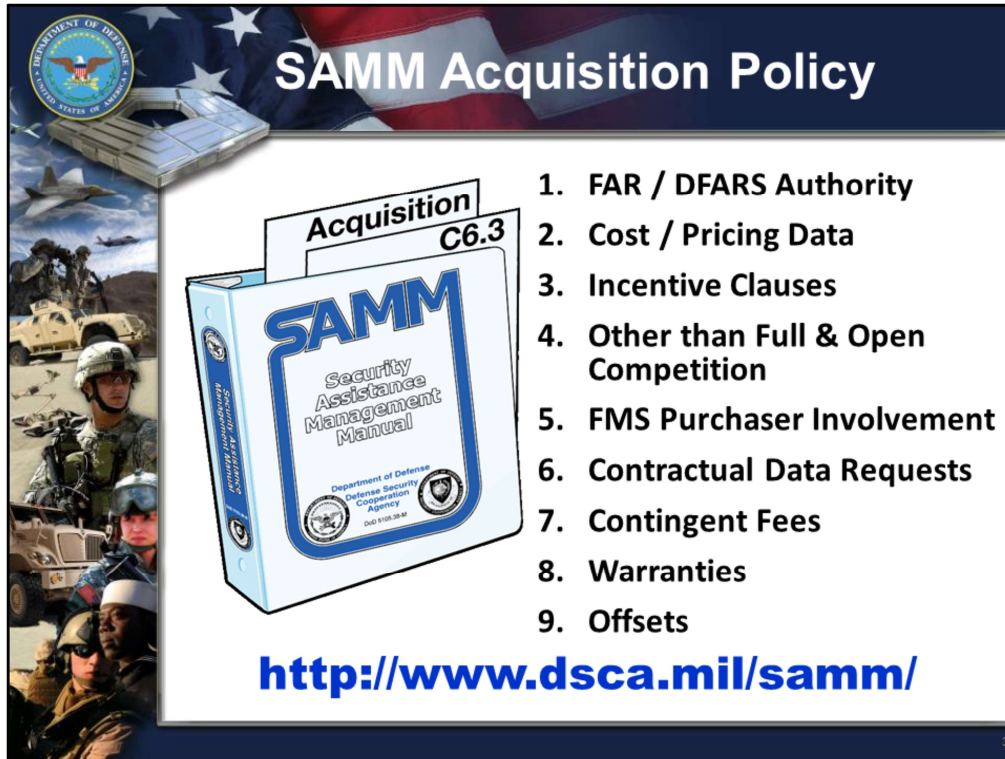
Welcome to the Contracting for FMS learning guide. Hopefully, you found the background Foreign Military Sales (FMS) information in the Introduction to Contracting for FMS guide to be helpful.

It is likely that DoD contracting personnel will, at some point in their career, be responsible for acquiring materiel and services in support of FMS requirements.

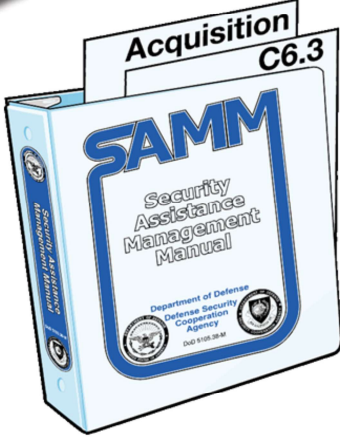
As such, this learning guide specifically focuses on some of the key topics applicable to contracting for FMS.



The Defense Security Cooperation Agency (DSCA) issues policy guidance to the security cooperation community through the Security Assistance Management Manual (SAMM). The SAMM provides DoD-wide guidance to all organizational entities within the DoD that are engaged in managing Security Assistance and Security Cooperation programs over which DSCA has responsibility. Section 6.3 of the SAMM discusses acquisition for FMS. The SAMM 6.3 states that the Federal Acquisition Regulation (FAR) and the Defense Federal Acquisition Regulation Supplement (DFARS) apply to FMS procurements.

The graphic features a blue header with the title "SAMM Acquisition Policy" in white. On the left, there is a vertical strip of images: the Department of Defense seal, a satellite dish, a fighter jet, and soldiers in a desert environment. In the center, a blue binder labeled "SAMM Security Assistance Management Manual" is shown, with a tab labeled "Acquisition C6.3". To the right of the binder is a numbered list of nine acquisition topics. At the bottom, the website URL "http://www.dsca.mil/samm/" is displayed in blue. A small number "3" is in the bottom right corner of the graphic.

SAMM Acquisition Policy



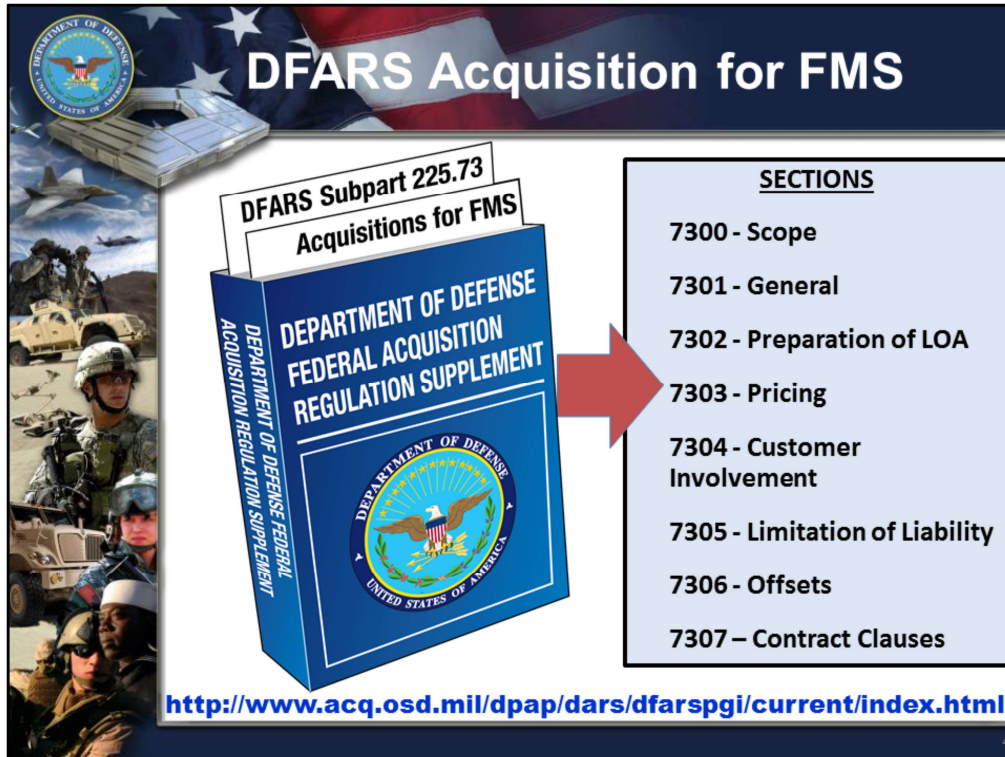
1. FAR / DFARS Authority
2. Cost / Pricing Data
3. Incentive Clauses
4. Other than Full & Open Competition
5. FMS Purchaser Involvement
6. Contractual Data Requests
7. Contingent Fees
8. Warranties
9. Offsets

<http://www.dsca.mil/samm/>

The SAMM C6.3 contains acquisition policies in support of security cooperation programs. The SAMM addresses nine acquisition topics which include:

- FAR / DFARS Authority
- Cost / Pricing Data
- Incentive Clauses
- Other than Full & Open Competition
- FMS Purchaser Involvement
- Contractual Data Requests
- Contingent Fees
- Warranties
- Offsets

Most of these same FMS acquisition topics are also addressed within the Defense Federal Acquisition Regulation Supplement (DFARS). The contracting community should be aware of the SAMM C6.3 content in addition to the content of the DFARS.

A graphic titled "DFARS Acquisition for FMS" with a background of an American flag and military imagery. It features a 3D book icon labeled "DFARS Subpart 225.73 Acquisitions for FMS" and "DEPARTMENT OF DEFENSE FEDERAL ACQUISITION REGULATION SUPPLEMENT". A red arrow points from the book to a box titled "SECTIONS" containing a list of seven sections. A URL is at the bottom.

DFARS Acquisition for FMS

**DFARS Subpart 225.73
Acquisitions for FMS**

**DEPARTMENT OF DEFENSE
FEDERAL ACQUISITION
REGULATION SUPPLEMENT**

SECTIONS


- 7300 - Scope
- 7301 - General
- 7302 - Preparation of LOA
- 7303 - Pricing
- 7304 - Customer Involvement
- 7305 - Limitation of Liability
- 7306 - Offsets
- 7307 - Contract Clauses

<http://www.acq.osd.mil/dpap/dars/dfarspgi/current/index.html>

While the overall content of the DFARS is applicable to procurements for FMS, the DFARS contains a subpart specifically dedicated to the unique aspects of contracting for FMS. This “special” FMS subpart is DFARS subpart 225.7300 titled “Acquisitions for FMS”.

There are seven sections in this subpart addressing the following topics:

- Scope
- General
- Preparation of LOA
- Pricing
- Customer Involvement
- Limitation of Liability
- Offsets
- Contract Clauses

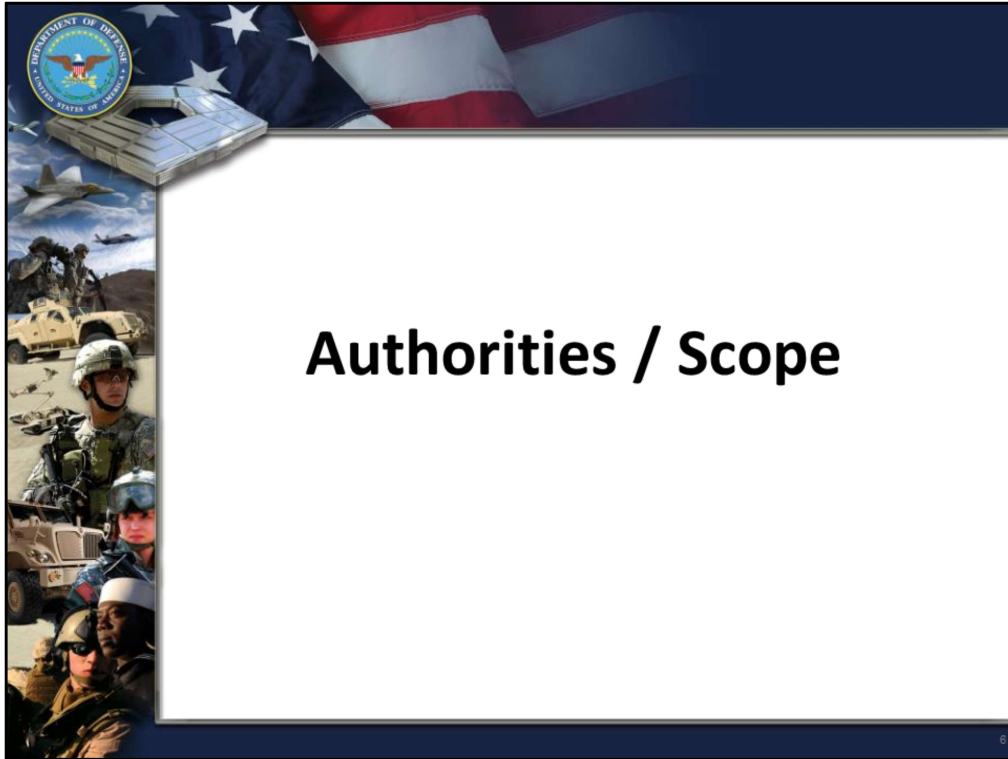


FMS Contracting Topics


Topic	SAMM Acquisition C6.3	DFARS Subpart Acquisition for FMS 225.73	Other SAMM Reference
Authorities/Scope	C6.3.1	7300	
Preparing Solicitations & Contracts with FMS		7301	
Contracting Officer Role in LOA Preparation		7302	C5.4.12
Pricing	C6.3.2	7303	
FMS Customer Involvement	C6.3.5	7304(b)	
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Offsets	C6.3.9	7306 & 7303-2	
Contingent Fees	C6.3.7	7303-4	
Warranties	C6.3.8	7304(b)(3)	
Contract Clauses	C6.3.3	7307	
Limitation of Liability		7305	C5.F4
FMS Customer Contractual Data Requests	C6.3.6	7304(h)	

Combining the SAMM 6.3 acquisition topics with the DFARS Subpart 225.73 “Acquisitions for FMS” topics produces this list of FMS related contracting topics.

This learning guide will briefly discuss each of these topics.

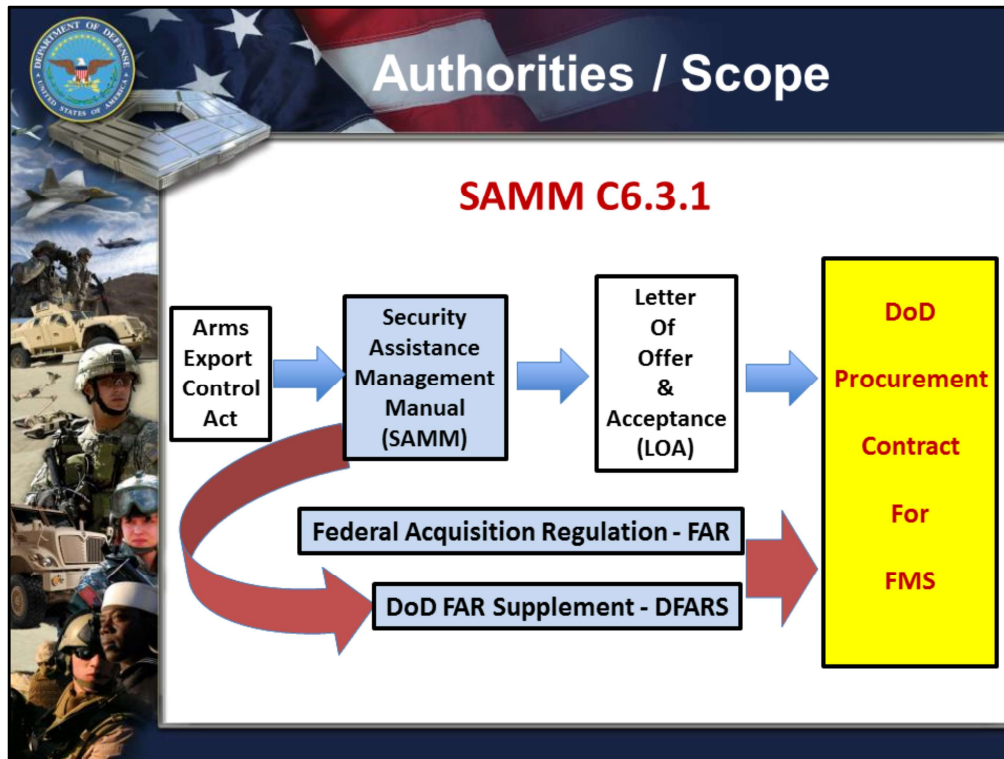


Authorities / Scope



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The SAMM states that acquisition for FMS procurements must be in accordance with DoD regulations and other applicable USG procedures. This policy provides the foreign purchaser the same benefits and protection that apply to DoD procurements and, per the SAMM, is one of the principal reasons why foreign governments and international organizations choose to procure through FMS channels.

This policy essentially states that DoD will procure for FMS partners in the same manner in which DoD procures for itself. In procuring for itself, the DoD follows the requirements and guidance of both the Federal Acquisition Regulation (FAR) and Defense Federal Acquisition Regulation Supplement (DFARS).

As such, even though traditional FMS requirements are not funded by U.S. appropriated funds, the provisions of the Federal Acquisition Regulation (FAR) and Defense Federal Acquisition Regulation Supplement (DFARS) are still applicable to FMS procurements.



Authorities / Scope

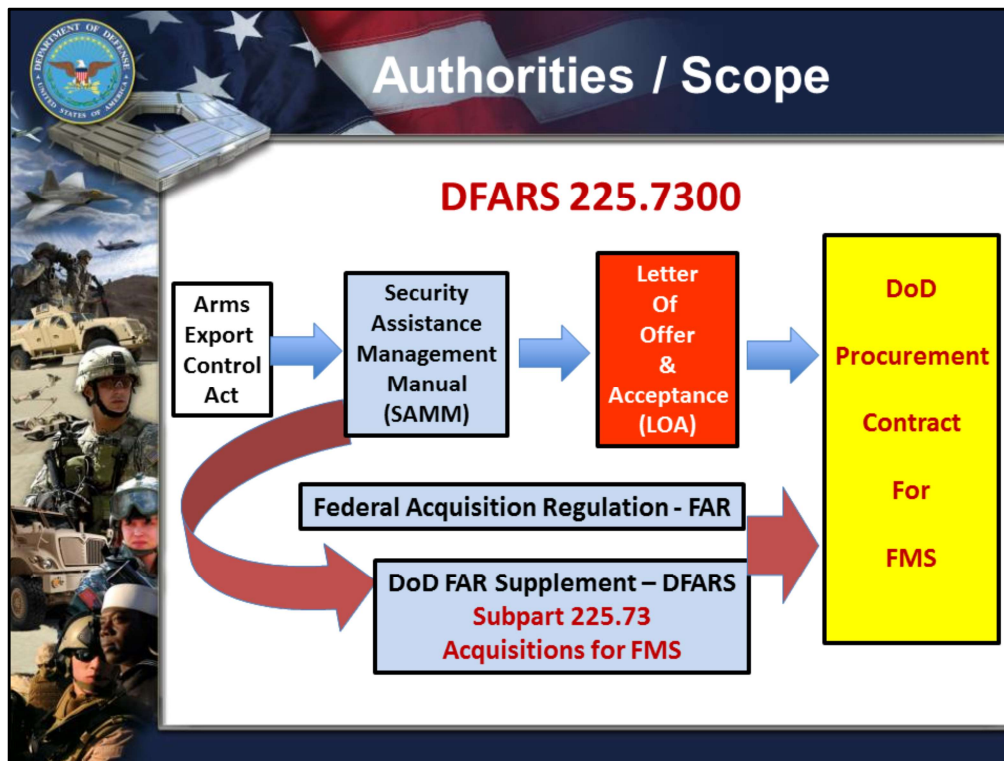
DoD <u>Procurement Contract</u>	
<u>CLIN 0001</u>	
0001A U.S. Air Force	200 ea
0001B U.S. Navy	125 ea
0001C FMS Bandaria	100 ea
0001D FMS Akkadia	50 ea
0001E FMS Zastavia	<u>25 ea</u>
TOTAL	500 ea

SAMM C6.3.1
FMS may be consolidated with USG requirements on the same contract.

DFARS 204.7103
Separate requirements to individual CLINS or Sub-CLINS due to different funding sources or delivery locations.

Additionally, the SAMM states that FMS requirements may be consolidated with USG requirements or placed on separate contract whichever is more expedient and cost effective.

If FMS requirements are consolidated with USG requirements or the requirements of other FMS customers, the direction of DFARS section 204.7103 requires that individual FMS customers' requirements should be separated on separate Contract Line Item Numbers (CLINs) or Sub-CLINs due to the different funding sources and delivery locations.




DFARS section 225.7300 states that the DFARS subpart “Acquisitions for FMS” contains the policies and procedures to contract for foreign military sales (FMS) as authorized by the Arms Export Control Act (AECA). The AECA, Section 22 authorizes DoD to enter into contracts for subsequent resale to foreign countries or international organizations.

DFARS section 225.7301 states that the USG sells defense articles and services to foreign governments or international organizations through FMS agreements known as Letters of Offer and Acceptance (LOAs) . Part 1 of this learning guide provided a brief overview of the FMS process used to generate LOAs.

DoD contracting personnel should have input into the development of the LOA because the LOA, if accepted by the FMS purchaser, will establish the subsequent procurement requirement and will provide the necessary procurement funding. The role of the contracting officer in LOA development will be addressed as a separate topic later in this learning guide.


Lastly, this DFARS section, like the SAMM, directs that FMS acquisitions are to be conducted under the same acquisition and contract management procedures used for other U.S. defense acquisitions.

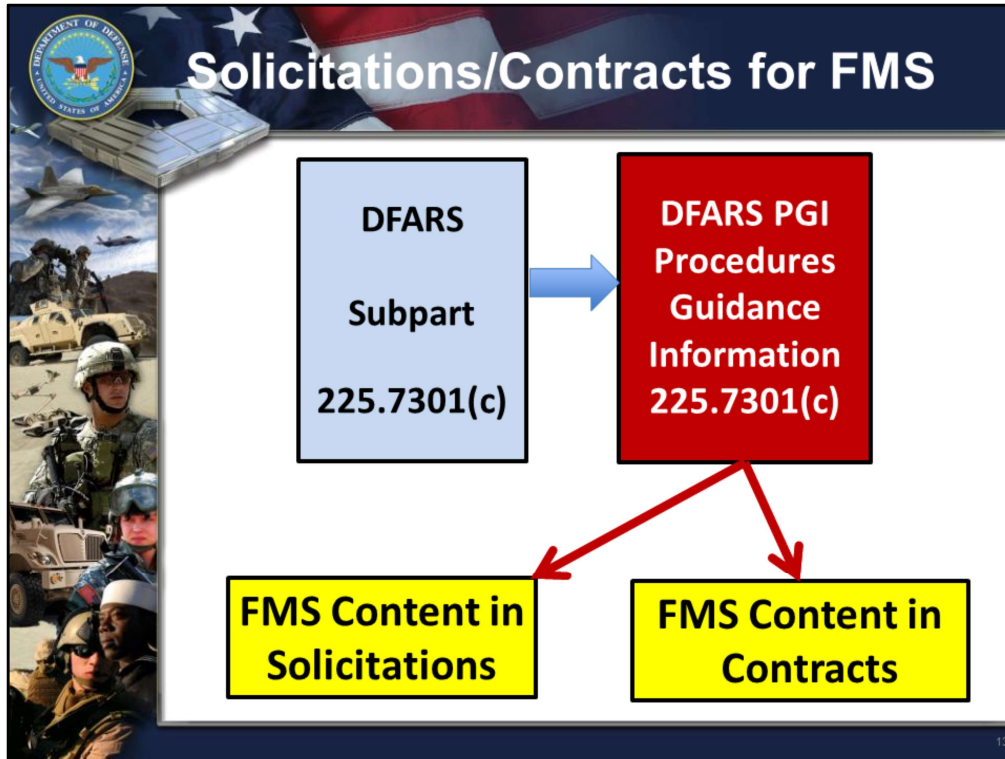




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The DFARS section 225.7301(c) directs that the additional procedures in the DFARS Procedures, Guidance and Information (PGI) paragraph 225.7301(c) be followed in preparing solicitations and contracts that include FMS requirements.

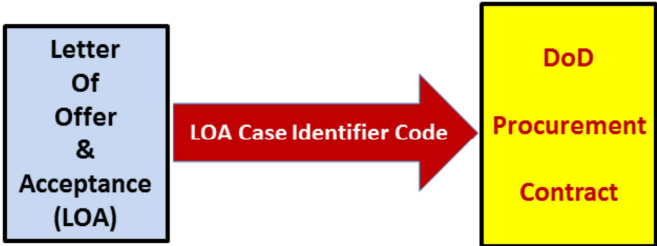
The DFARS PGI outlines several types of important additional or unique information to be included in solicitations and contracts that include FMS requirements.



Solicitations/Contracts for FMS

DFARS PGI 225.7301(c)

- (i) Separately identify FMS requirements and the FMS customer in solicitations
- (ii) Identify the LOA case identifier code in the contract Section B of the schedule



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graph LR; A[Letter Of Offer & Acceptance (LOA)] -- "LOA Case Identifier Code" --> B[DoD Procurement Contract]
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All contract solicitations for FMS should separately identify the FMS requirement, the applicable FMS customer, and the LOA FMS case identifier. This informs the contractor which requirements are for FMS and may be subject to the unique FMS pricing guidance in DFARS 225.7303. We will discuss FMS pricing later in this learning guide.

Contracts containing FMS content are to identify the FMS LOA identifier code in section B of the Schedule. As stated earlier in this learning guide, DFARS 204.7103 section 204.7103 states that individual FMS customers' requirements should be separated on separate Contract Line Item Numbers (CLINs) or Sub-CLINs due to the different funding sources and delivery locations.



Solicitations/Contracts for FMS

DoD FMR Vol 15, Section 010302

- Direct cite the FMS Trust Fund Account: 97-11X8242
- Separate Accounting Classification Reference Numbers (ACRNs) for FMS requirements
 - Associated long line of accounting will identify the:
 - FMS Country
 - FMS Case Identifier
 - Specific line of the FMS case providing the funding

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The DoD Financial Management Regulation (FMR), Vol 15, “Security Cooperation Policy”, Chapter 1, Section 010302 states that new procurements for FMS orders should, to the maximum extent feasible, directly cite the FMS Trust Fund (97-11 X 8242) in contractual documents.

This means that a separate Accounting Classification Reference Number (ACRN) will be cited in Section G of the contract for the requirements of each different LOA line item. The long line of accounting associated with the ACRN cites not only the FMS trust fund but also the specific FMS country, Letter of Offer & Acceptance (LOA) FMS case and the LOA line number that is funding the respective FMS requirement.



Solicitations/Contracts for FMS

DFARS 204.71

- Uniform Contract Line Item Numbering System
- Separate CLINs or Sub-CLINs for FMS Requirements
- Payment Instructions for FMS per DFARS PGI 204.7108(8) & (9)

DFARS 204.71 discusses the uniform contract line item numbering system.

Per the guidance in DFARS 204.7104-1 (b), if FMS requirements are not already on a separate Contract Line Item Number (CLIN), they should be separated onto a Sub-CLIN. Some of the criteria listed for creating separate Sub-CLINS includes when items bought under one CLIN:

- a. Are to be paid for from more than one accounting classification
- b. Have different delivery dates or destinations, or requisitions.

FMS requirements will have different funding sources, delivery dates, delivery locations or requisitions. As a result, FMS requirements should be separated onto separate Contract Line Item Numbers (CLINs) or sub-CLINs.

Additionally, the use of payment instructions help avoid payment errors and will facilitate the eventual FMS LOA reconciliation and closure process. DFARS PGI 204.7108(8) states that contracts that contain FMS requirements shall include instructions for distribution of the contract financing payments to each country's account. DFARS PGI 204.7108(9) directs to use one of the standard payment instructions.



Solicitations/Contracts for FMS

DFARS PGI 225.7301(c)

- **(iii)** Ensure LOA terms and conditions and **(viii)(B & C)** country unique LOA requirements or commodity requirements are incorporated into the contract
- **(iv)** Shipping terms: Free On Board (FOB) origin

**LOA
Content**

→

**Contract
Content**

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The procurement contract executes the requirements contained in the government to government LOA agreement. As such, the contracting officer should be familiar with the content of the LOA and ensure that any FMS or country unique terms, conditions or requirements are incorporated into the procurement contract.

Ideally, the contracting officer should participate in the LOA preparation to ensure that the LOA appropriately addresses and clarifies any issues necessary to efficiently and effectively solicit bids/offers, evaluate bids/offers, and negotiate contract terms and costs.

Additionally, the DFARS directs that shipping terms for FMS material are to be FOB origin. The FAR 47.303 provides a multi-page definition of the term “FOB origin”



Solicitations/Contracts for FMS

DFARS PGI 225.7301(c)(vi)

- Comply with Defense Transportation Regulation, Part II for FMS packaging, labeling and documentation
 - Appendix E: Security Cooperation Shipments (44 pages)
 - Transportation plans required for classified; arms, ammo & explosives; hazardous materiel
- SAMM Chapter 7 also discusses transportation


**Defense Transportation Regulation 4500.9-R
Part II Cargo Movement
Appendix E**

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Most FMS customers utilize a commercial freight forwarder to move FMS materiel from the CONUS to final destination. LOAs use codes called “Delivery Term Codes (DTC)” to define the extent of transportation services that the FMS customer wants the USG to arrange for and fund under the LOA. The default DTC is “4” which means the FMS customer must arrange and pay for all transportation from point of origin with no USG transportation action or funding under the LOA.

DFARS states that contracting officers shall ensure that contracts involving the acquisition and delivery of FMS material comply with the policies, procedures, packaging, labeling, and documentation requirements specified by the Defense Transportation Regulations 4500.9-R-Part II, Appendix E – Security Cooperation Program Shipments: Foreign Military Sales and Building Partner Capacity Cooperative Programs. Appendix E contains 44 pages of detailed information about FMS and Building Partner Capacity shipments. SAMM chapter 7 also discusses transportation

FMS transportation plans are required for classified and certain arms, ammunition, explosives and hazardous materiel. The USG approved transportation plan will document the planned transportation and storage movements from point of origin to final in-country destination. SAMM C7.13 discusses the use of transportation plans.



Solicitations/Contracts for FMS

DFARS PGI 225.7301(c)(vii)

- USG representative responsible for acceptance shall ensure the contractor prepares material inspection and receiving reports in compliance with DFARS Appendix F:
 - F-301(b)(15)(iv)(K) for Wide Area WorkFlow
 - F-401(b)(16)(iv)(L) for a paper DD 250
- Shipping information requires FMS case identifier, special markings and gross weight
- Information needed for customs clearance

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In accordance with DFARS Appendix F, FMS shipment documentation is to include the special markings and FMS case identifier from the contract as well as entering the gross weight. The shipping information to include the respective FMS case is necessary for customs clearance.

Several Defense Contract Management Agency transportation officers state that rather than including shipping instructions in the contract, they prefer that the contract instruct the contractor to contact the DCMA transportation officer for shipping instructions. This method ensures that the contractor is receiving the most current shipping information. This is particularly important for contracts that may have a long production lead-time as transportation arrangements may change between time of contract award and actual contract shipment.



Solicitations/Contracts for FMS


DFARS PGI 225.7301(c)

- **(viii)(A)** Use of Contracting Officer's Representative
 - Provide detailed contact information
- **(viii)(D)** Cite the FMS Transportation Accounting Code in the contract
 - FMS transportation account is a subsidiary account within the overall FMS trust fund
 - LOA funds are deposited into the FMS transportation account based on the transportation codes within the LOA
 - FMS transportation costs are billed to the FMS transportation account

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If a contracting officer's representative is assigned, identify detailed point of contact information to include email, phone number with international dialing protocols, and physical mailing address. Occasionally, personnel within the overseas Security Cooperation Office (SCO) may be assigned COR responsibilities

If the LOA contains a delivery term code (DTC) indicating the U.S. will arrange transportation beyond the point of origin, the LOA will generally collect funds for this transportation service by applying a percentage based transportation cost against the item price. The funds collected through application of the DTC codes are collected into the FMS transportation account. The FMS transportation account is then used to pay for the USG arranged transportation services as documented in the LOA.



Solicitations/Contracts for FMS

DFARS PGI 225.7301(c)

- Period of Pseudo LOA funds availability
 - Contract performance period must be consistent with funds availability
 - Pseudo LOAs and Building Partner Capacity (BPC) will be discussed further later in this learning guide

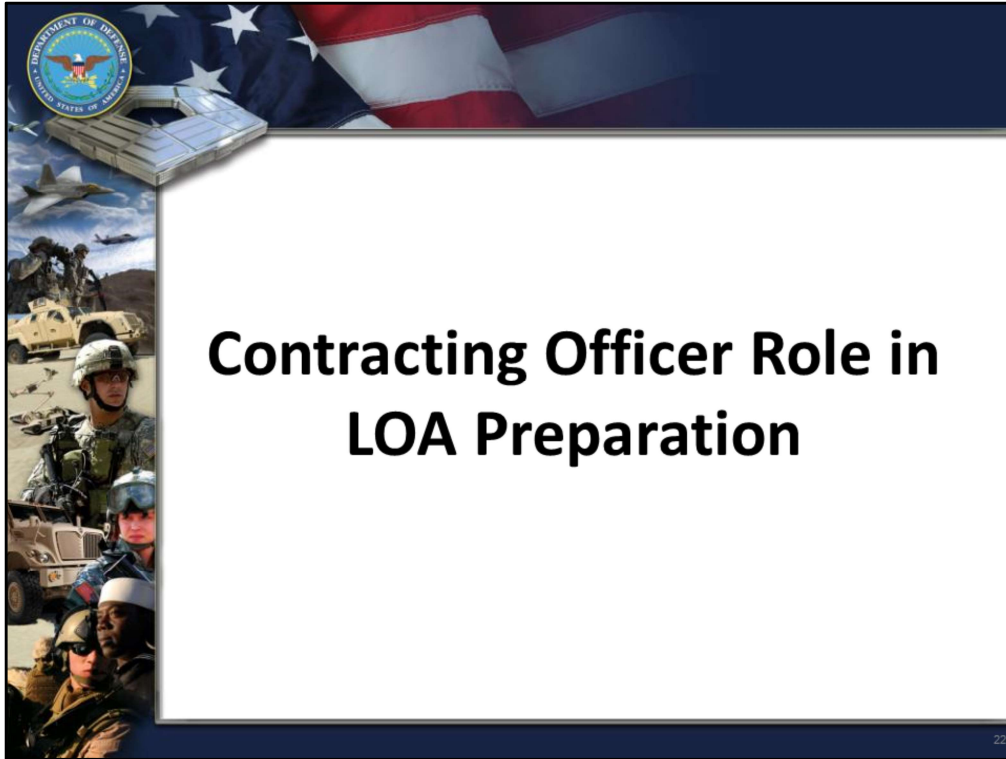
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Pseudo LOAs are used in conjunction with Building Partner Capacity (BPC) programs. BPC programs are a separate topic that is covered in more detail later in this learning guide.

For now, a special type of LOA, called a pseudo LOA, is used to fund certain types of Security Cooperation programs collectively called Building Partner Capacity (BPC) programs. BPC programs are funded with U.S. appropriated funds. Even though these appropriated funds have been applied to a pseudo LOA, the funds continue to retain their original period of availability for obligation and expenditure.

This DFARS section requires that the contract period of performance be consistent with the period of funds availability.

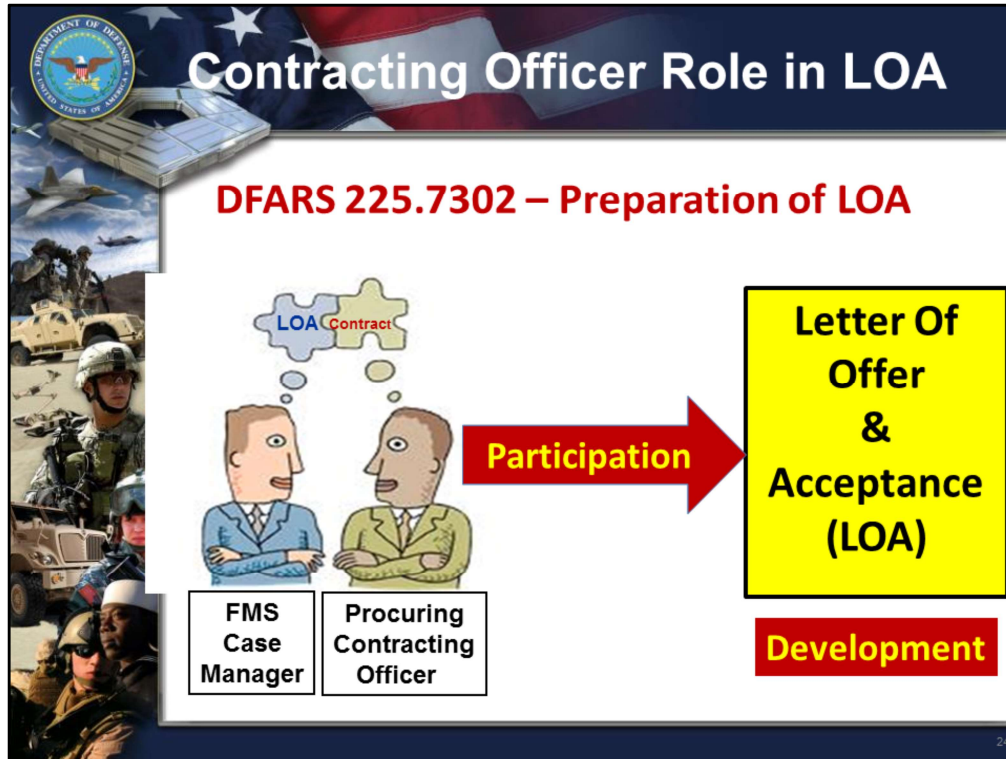
This BPC financial reality is in sharp contrast to traditional customer cash funded and Foreign Military Financing Program (FMFP) funded LOAs where the funds are no year funds and do not have obligation periods or expiration dates. Each pseudo-LOA for a BPC program will include a note with the LOA that specifies the period of funds availability. It is important for contracting personnel to know what type of funds have been applied to the respective LOA.





FMS Contracting Topics

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FMS Customer Contractual Data Requests	C6.3.6	7304(h)	



The FMS Letter of Offer and Acceptance (LOA) documents the customer's requirements and provides both the authority and funding to initiate contracting actions. In preparing the LOA, the FMS case manager must clearly understand the customer's requirements to ensure the LOA addresses all customer needs.

Simultaneously, the case manager must coordinate with the contracting officer to ensure that contract related issues are adequately addressed with the customer and appropriately documented within the LOA.

The Defense Federal Acquisition Regulation Section 225.7302 – refers to the Procedures, Guidance and Information (PGI) 225.7302 in regard to role of the contracting officer supporting FMS programs that will require acquisition. This information will be discussed on the next screen.

The goal is to produce an LOA that both captures all of the international customer's requirements and an LOA that can be executed within the USG contracting processes and regulations.

The key to success in this area is clear communication early in the LOA preparation process between the FMS customer, the Implementing Agency case manager and the applicable DoD contracting organization.



Contracting Officer Role in LOA

DFARS 225.7302

Contracting Officer **shall** assist the LOA implementing agency (IA) by—

(1) Working with **prospective contractors** to—

- (i) Identify, **in advance of the LOA**, any unusual provisions or deviations;
- (ii) Advise the contractor if the IA expands, modifies, or does not accept any key elements of the contractor's proposal;
- (iii) Identify any logistics support necessary to perform the contract; and
- (iv) For noncompetitive acquisitions over \$10,000, **ask the prospective contractor for information on price, delivery, and other relevant factors**





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The DFARS section 225.7302 identifies specific actions that the contracting officer should take to assist the case manager to prepare an LOA. The contracting officer's knowledge and experience is essential to realistically estimate cost and performance issues regarding any potential procurement actions which may result from the LOA.

The DFARS requires the contracting officer to assist the LOA implementing agency by interfacing with prospective contractors. The DFARS identifies some of the areas where the contracting officer should consult with industry. These include identifying any unusual provisions during LOA development, providing implementing agency feedback to contractors' proposals, identifying any logistics support necessary to perform the contract and to obtain price, delivery and other relevant information from the contractors for noncompetitive acquisitions over \$10,000.

Often, particularly for major systems, industry will have already been engaged with the international partner prior to the FMS customer formally submitting the LOA request to the USG. Industry may have unique information that should be considered in the LOA preparation.

Ultimately, the contracting officer will obtain estimated cost, delivery and other relevant information from the prospective contractors that will serve as the basis to prepare the LOA cost and delivery lead time estimates.




Contracting Officer Role in LOA

DFARS PGI 225.7302(2)

Work with the Implementing Agency responsible for preparing the LOA to—


- (i) Assist as necessary in preparation of the LOA;
- (ii) Identify and explain all unusual contractual requirements or requests for deviations; and
- (iii) Assist in preparing the price and availability data.



A second area of FMS contracting officer responsibility involves working with the case manager at the implementing agency to develop the LOA. An FMS case manager's primary area of expertise is security cooperation policies and processes. The contracting community, specifically the Procuring Contracting Officer (PCO), knows the details of acquiring the respective item or service.

DFARS PGI 225.7302 states that the contracting officer shall assist the implementing agency to prepare the LOA, identify and explain all unusual contractual requirements and to assist in preparing price and availability data (P&A).

The content of the LOA being developed by the case manager and any future procurement action awarded by the PCO needs to be consistent. The LOA, when offered by the USG, establishes a level of expectation on the part of the FMS customer. If the FMS customer accepts the LOA, the responsibility for procurement execution will be tasked to the PCO. As such, the content of the LOA must be executable within the context of the FAR and DFARS. PCO involvement in LOA development will facilitate a smooth transition into procurement execution and will help to avoid creating any false execution expectations with the FMS customer.



Contracting Officer Role in LOA

- Realistically set customer expectations
 - Total Cost
 - Payment Schedule
 - Delivery Schedule
 - Expenditure Profile
- Identify any unique issues to be addressed with customer
- Support **pre-countersignature LOA review** with DSCA (SAMM C5.4.12)


Payment Date	Quarterly	Cumulative
Initial Deposit	\$1,100,000	\$1,100,000
15 Jun 2016	600,000	1,700,000
15 Sep 2016	800,000	2,500,000
15 Dec 2016	700,000	3,200,000
15 Mar 2017	900,000	4,100,000

As described in DFARS PGI 225.7302 , the contracting officer plays a critical role in LOA development when the FMS requirement will be sourced from procurement. The contracting officer is the source for realistic estimates of the total costs and the projected delivery schedule. The total cost and delivery schedule establish the projected expenditure profile for the LOA. The LOA estimated payment schedule will be formed based on this information. Together, this shapes the customer expectations for LOA performance from both a financial and logistics perspective.

Based on the contracting officer’s knowledge and experience, issues that should be initially addressed with the FMS customer can be identified and discussed so that the results can be incorporated in the government-to-government LOA agreement.


The SAMM C5.4.12 establishes the potential for DSCA to convene an LOA pre-countersignature meeting for major sales. Attendees at the meeting will be DSCA, the implementing agency and the prime contractor. At this meeting, the implementing agency is responsible for presenting a plan to manage the program/delivery performance schedule as consistent with the financial requirements in the payment schedule. The plan should address the contract financing vehicle, anticipated contract payment milestones, and known purchaser budget constraints. If convened, the implementing agency will need the contracting officer’s input to support this DSCA meeting.

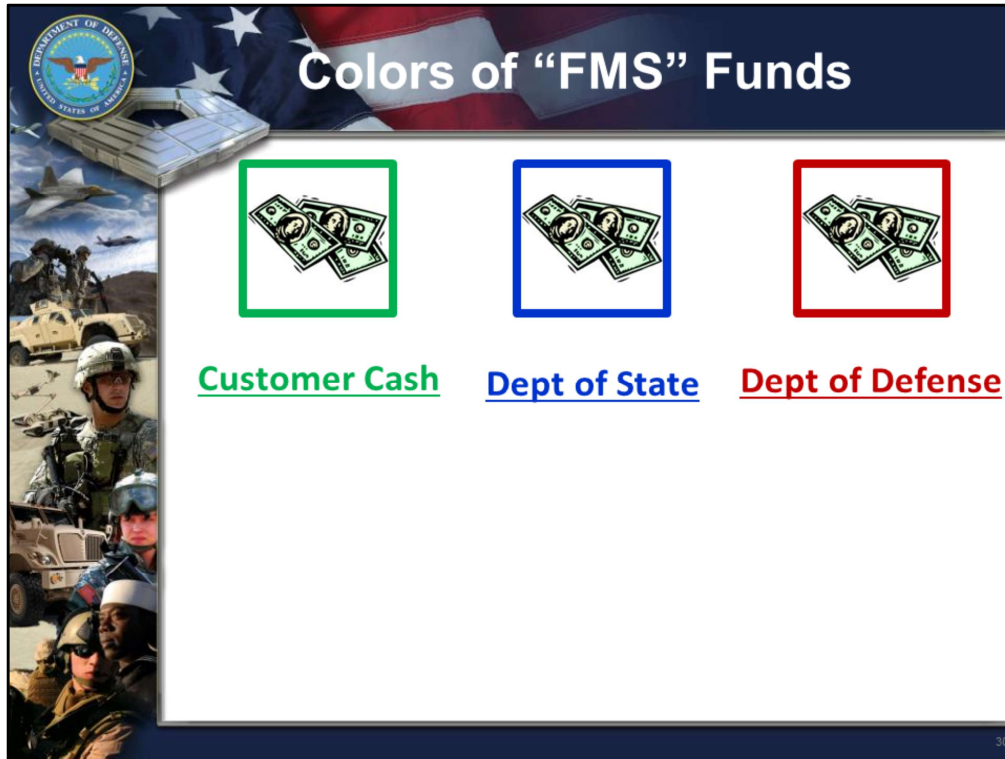




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Pricing acquisitions for FMS is the next topic discussed in DFARS Subpart 225.73 – Acquisitions for FMS. However, as we will see, the DFARS pricing policy is dependent upon the type of funds used in the LOA. So, before we discuss contract pricing, we must first discuss the potential types of LOA funding.

All FMS programs are not the same. One key difference among FMS programs is driven by the type or color of funds used to finance the LOA. It is essential that the contracting community clearly understand the type or types of funds used on an LOA because the type of LOA funding directly impacts the types of contract costs that may or may not be permissible per the DFARS section 225.7303 “Pricing Acquisitions for FMS”.

There are three fundamental financial varieties of FMS programs: 1) customer cash funded, 2) USG funded via the Department of State, and 3) USG funded via the Department of Defense.



Colors of “FMS” Funds

 <u>Customer Cash</u>	 <u>Dept of State</u>	 <u>Dept of Defense</u>
<ul style="list-style-type: none"> • Customer Source • No Year Limits • DFARS “Cost of Doing Business with a Foreign Government” Applies • Customer Sole Source Request Permitted 	<ul style="list-style-type: none"> • Foreign Military Financing Program • No Year Limits • <u>Excluded</u> in DFARS Cost of International Business • Customer Sole Source Request Permitted 	<ul style="list-style-type: none"> • Appropriated to DoD • Year Limits • Normal DoD Cost Allowability Rules • Pseudo-cases • Customer Sole Source <u>NOT</u> Permitted

Traditional FMS involves the foreign purchaser directly funding their own FMS programs. The funds on customer financed LOAs are “no year” funds. This means that there are no specific obligation or expenditure windows of time for the funds to remain valid. Customer funds remain valid for obligation and expenditure indefinitely without any funds expiration date.

Additionally, contracts financed from customer funded LOAs are subject to the DFARS subsection 225.7303-2 provisions on the allowability of various cost elements referred to as “Cost of Doing Business with a Foreign Government”. The allowability of the costs of doing business with a foreign government will be discussed later in this learning guide.

Also, if the international partner is funding the LOA with their own fund source, the international partner can request “Other than Full and Open Competition” procurement. This is known as “sole source” procurement within the FMS community. Sole source will also be discussed later in this learning guide.



Colors of “FMS” Funds

 <u>Customer Cash</u>	 <u>Dept of State</u>	 <u>Dept of Defense</u>
<ul style="list-style-type: none"> • Customer Source • No Year Limits • DFARS “Cost of Doing Business with a Foreign Government” Applies • Customer Sole Source Request Permitted 	<ul style="list-style-type: none"> • Foreign Military Financing Program • No Year Limits • <u>Excluded</u> in DFARS Cost of International Business • Customer Sole Source Request Permitted 	<ul style="list-style-type: none"> • Appropriated to DoD • Year Limits • Normal DoD Cost Allowability Rules • Pseudo-cases • Customer Sole Source <u>NOT</u> Permitted

A second variety of FMS utilizes Department of State Foreign Military Financing Program (FMFP) grant funds to finance the LOA. The LOA term of sale is located roughly midway down on the first page of the LOA. The term of sale for FMFP funded LOAs is “FMS Credit (Non-Repayable)”.

FMFP funds are appropriated funds that are obligated upon apportionment by the Office of management and Budget (OMB). Subsequent transfers of FMF funds to the FMS Trust Fund account are expenditure transfers. Once transferred, FMF funds are expended and remain available indefinitely within the FMS Trust Fund for disbursements. As such, the FMFP grant funds are effectively “no year” funds and remain valid for obligation and expenditure indefinitely without any funds expiration date.

Colors of "FMS" Funds

Customer Cash	Dept of State	Dept of Defense
<ul style="list-style-type: none"> Customer Source No Year Limits DFARS "Cost of Doing Business with a Foreign Government" Applies Customer Sole Source Request Permitted 	<ul style="list-style-type: none"> Foreign Military Financing Program No Year Limits Excluded in DFARS Cost of International Business Customer Sole Source Request Permitted 	<ul style="list-style-type: none"> Appropriated to DoD Year Limits Normal DoD Cost Allowability Rules Pseudo-cases Customer Sole Source <u>NOT</u> Permitted




Additionally, when a contract is to be funded from a FMFP financed LOA, the DFARS subsection 225.7303-2 provisions on the allowability of various cost elements referred to as "Cost of Doing Business with a Foreign Government" do NOT apply. This DFARS subsection directs FMS contracts wholly paid for from funds made available on a nonrepayable basis (i.e. FMFP) to be priced on the same costing basis as is applicable to acquisitions of like items purchased by DoD for its own use.

Direct costs associated with meeting a foreign customer's additional or unique requirements are allowable under such contracts. Indirect burden rates applicable to such direct costs are permitted at the same rates applicable to acquisitions of like items purchased by DoD for its own use.

Offsets are a separate topic discussed later in this learning guide, however; at this point it is important to recognize that a defense contractor may not recover costs incurred for offset agreements if the LOA is financed with funds made available on a nonrepayable basis (FMFP).

Lastly, even though the contract cost allowability rules differ for FMFP funded LOAs, an international partner is still permitted to request "Other than Full and Open Competition" also known as "sole source" on LOAs funded by FMFP nonrepayable funds.

Colors of "FMS" Funds

 <u>Customer Cash</u>	 <u>Dept of State</u>	 <u>Dept of Defense</u>
<ul style="list-style-type: none"> • Customer Source • No Year Limits • DFARS "Cost of Doing Business with a Foreign Government" Applies • Customer Sole Source Request Permitted 	<ul style="list-style-type: none"> • Foreign Military Financing Program • No Year Limits • <u>Excluded</u> in DFARS Cost of International Business • Customer Sole Source Request Permitted 	<ul style="list-style-type: none"> • Appropriated to DoD • Year Limits • Normal DoD Cost Allowability Rules • Pseudo-cases • Customer Sole Source <u>NOT</u> Permitted

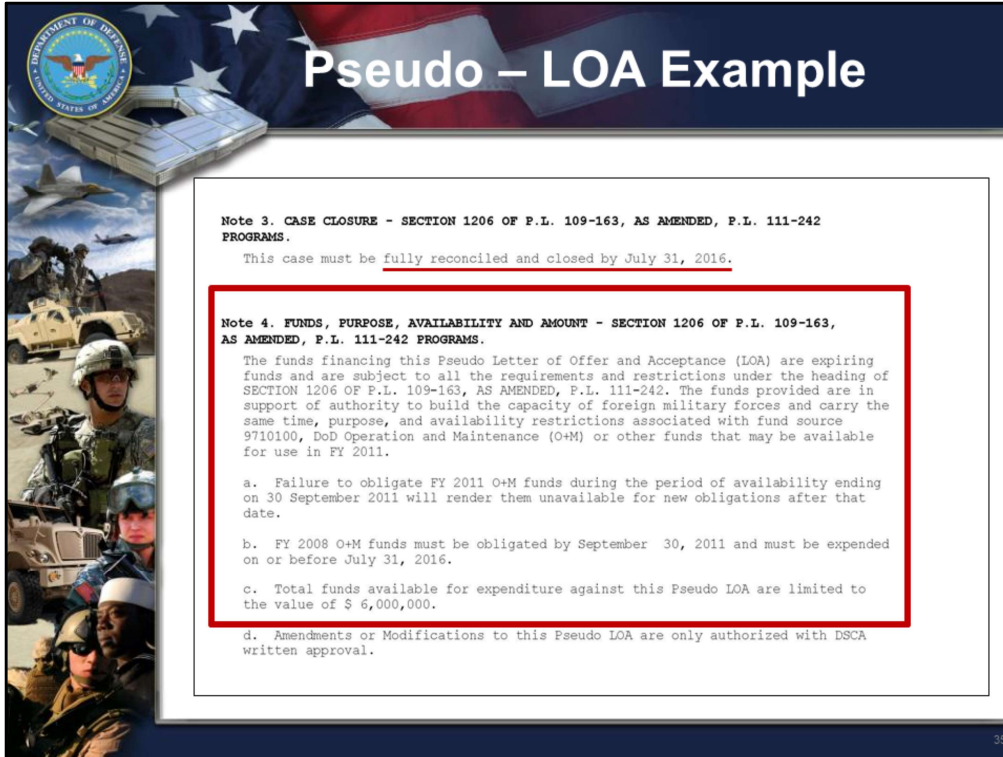
A third variety of FMS involves use of funds appropriated to DoD, or in some instances to other U.S. Government entities, to fund the LOA. Congress provides specific legal authorities to use certain amounts of certain USG appropriated funds to finance programs that are collectively referred to as Building Partner Capacity programs. The SAMM Chapter 15 specifically describes the BPC programs and references the applicable legal authorities and respective period of funds availability.

DFARS PGI section 225.7300 recognizes that the DoD contracting community will be supporting both traditional FMS programs as well as BPC programs funded with appropriated funds. This PGI section states that the FMS acquisition infrastructure will also execute LOAs funded with U.S. appropriated funds under special authority to build international partner capacity. These BPC cases are implemented using pseudo-LOAs.

A key difference that contracting officers must recognize is that all of the time limits originally applicable to the respective appropriation remain in effect even though these funds are applied to an LOA. For this and other reasons, BPC LOAs are referred to as pseudo-LOAs. Year limits apply to the obligation and expenditure windows for these funds. Additionally, these funds expire. The obligation, expenditure and expiration dates applicable to the respective pseudo-LOA funds will be specifically identified as a narrative note within the pseudo-LOA itself.

Because BPC programs use appropriated funds, the DFARS subsection 225.7303-2 provisions on the allowability of various cost elements referred to as "Cost of Doing Business with a Foreign Government" are NOT applicable to BPC programs.

Additionally, the international partner cannot request procurement from "Other than Full and Open Competition" because the FAR subsection 6.302-4 "International Agreement" justification is not applicable to BPC pseudo-LOA programs. For BPC programs, any "Other than Full and Open Competition" justification must be generated by the DoD based on one of the other FAR Section 6.302 exceptions.



Pseudo – LOA Example

Note 3. CASE CLOSURE - SECTION 1206 OF P.L. 109-163, AS AMENDED, P.L. 111-242 PROGRAMS.

This case must be fully reconciled and closed by July 31, 2016.


Note 4. FUNDS, PURPOSE, AVAILABILITY AND AMOUNT - SECTION 1206 OF P.L. 109-163, AS AMENDED, P.L. 111-242 PROGRAMS.

The funds financing this Pseudo Letter of Offer and Acceptance (LOA) are expiring funds and are subject to all the requirements and restrictions under the heading of SECTION 1206 OF P.L. 109-163, AS AMENDED, P.L. 111-242. The funds provided are in support of authority to build the capacity of foreign military forces and carry the same time, purpose, and availability restrictions associated with fund source 9710100, DoD Operation and Maintenance (O+M) or other funds that may be available for use in FY 2011.

- a. Failure to obligate FY 2011 O+M funds during the period of availability ending on 30 September 2011 will render them unavailable for new obligations after that date.
- b. FY 2008 O+M funds must be obligated by September 30, 2011 and must be expended on or before July 31, 2016.
- c. Total funds available for expenditure against this Pseudo LOA are limited to the value of \$ 6,000,000.
- d. Amendments or Modifications to this Pseudo LOA are only authorized with DSCA written approval.

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These highlighted notes within the pseudo-LOA identify the obligation and expenditure windows for the respective pseudo-LOA funds. All contracting actions that result from the pseudo-LOA must be made in accordance with these funding limitations.



Building Partner Capacity

Pseudo LOA = Building Partner Capacity (BPC)

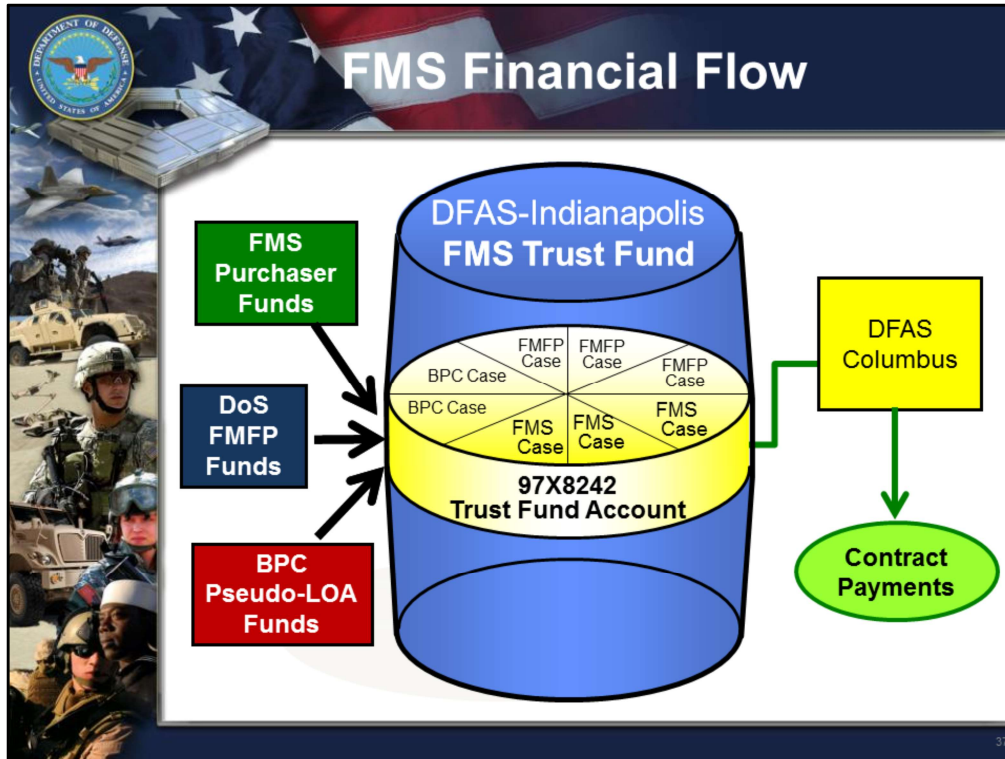
- Budget authority for BPC/pseudo cases is executed from the FMS Trust Fund
- Lines of accounting look like no-year money (**97-11 X 8242**), BUT must be administered per the respective appropriation limitations
- PGI 225.7301(v) – For pseudo LOAs, **ensure that the contract is consistent with the period of funds availability**



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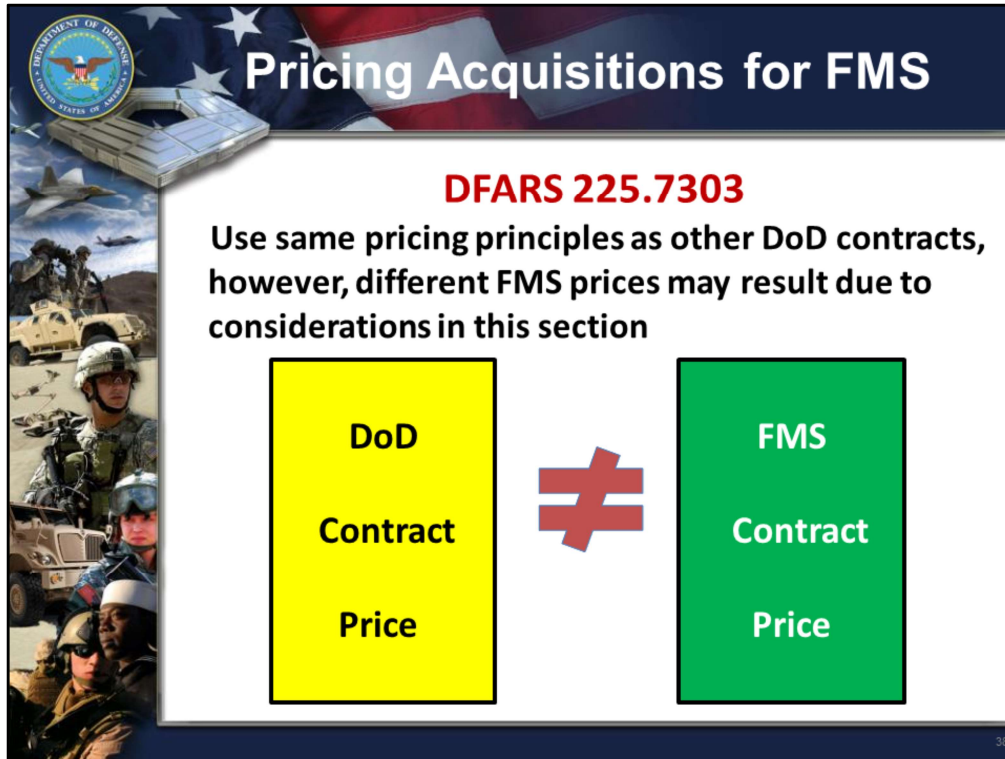
Although Building Partner Capacity programs use appropriated funds, these funds are still managed through the FMS trust fund account 97-11X8242. As a result, the line of accounting on a funding document may appear to be traditional “no year” FMS funds; however, these pseudo-case funds retain the source appropriation limitations for obligation, expenditure and expiration.

For pseudo LOAs, DFARS PGI 225.7301(v) directs the contracting officer to ensure that the period of performance in the contract is consistent with the period of availability of appropriated funds.



This chart illustrates the flow of all funds through the FMS trust fund, 97X8242. All funds supporting an LOA will flow through the FMS trust fund to include FMS customer cash, DoS provided Foreign Military Financing Program (FMFP) funds or other USG appropriated funds for Building Partner Capacity programs executed through a pseudo-LOA.

Contracting officers must know what type funds have financed the respective LOA so that the appropriate contracting guidance is executed as the respective requirements are placed on contract.



Pricing Acquisitions for FMS

DFARS 225.7303

Use same pricing principles as other DoD contracts, however, different FMS prices may result due to considerations in this section

DoD	≠	FMS
Contract		Contract
Price		Price

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Pricing acquisitions for FMS is the next topic discussed in DFARS Subpart 225.73 – Acquisitions for FMS.

This DFARS section states that FMS contracts are to be priced using the same principles used in pricing other defense contracts. However, application of the pricing principles in FAR Parts 15 (Contracting By Negotiation) and 31 (Contract Cost Principles and Procedures) to an FMS contract may result in prices that differ from other defense contract prices for the same item due to the considerations in this section.

DFARS subsection 225.7303-2 titled “Cost of Doing Business with a Foreign Government or International Organization” identifies some the cost factors that may influence the FMS contract price being different than DoD prices.



Pricing Acquisitions for FMS

DFARS 225.7303-2 & 225.7303-5

- Recognize the reasonable & allocable **cost of doing business with an international customer**, even though costs might not be recognized in the same amounts in DoD only contracts
 - Selling expenses
 - Product support and post delivery service expenses
 - Offset costs
 - Independent Research & Development and Bid & Proposal
- Nonrepayable U.S. funded LOAs revert to DoD costing guidance

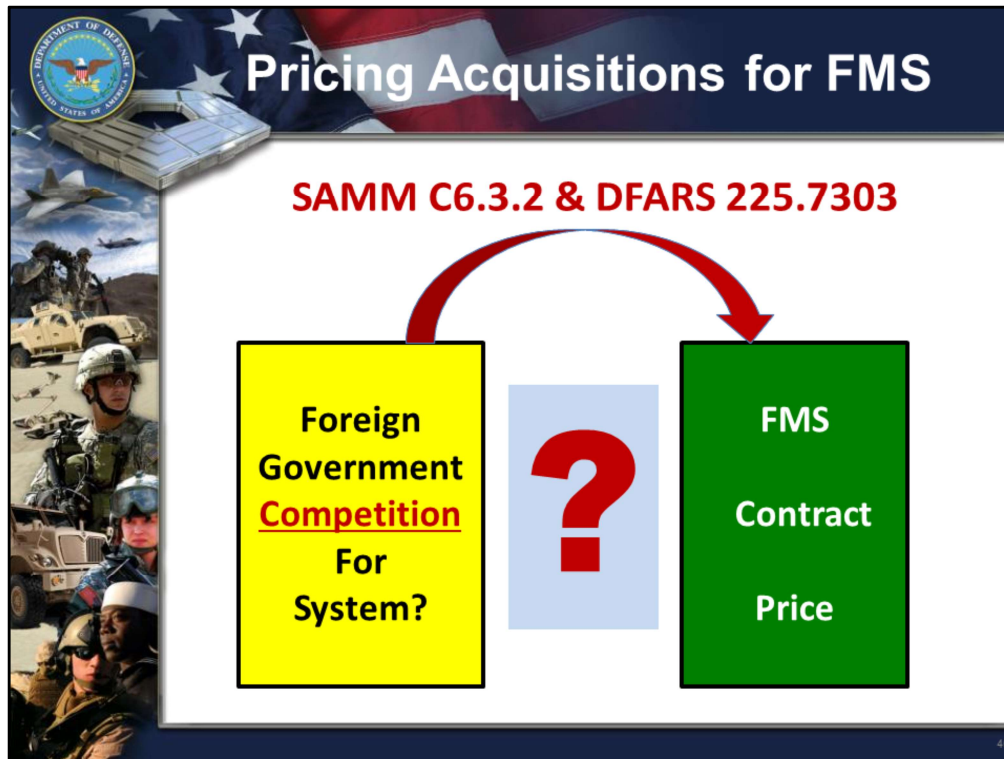
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DFARS 225.7303-2 states that in pricing FMS contracts where non-U.S. Government prices do not exist, to recognize the reasonable and allocable costs of doing business with a foreign government even though such costs might not be recognized in the same amounts in pricing other DoD contracts.

The DFARS then lists some examples of costs of doing business with a foreign government such as: selling expenses (contingent fees), product support costs, post-delivery service expenses, offset costs, and other Independent Research & Development (IRD) and Bid & Proposal (B&P) costs.

Although this subsection mentions “Offsets”, this learning guide will discuss “Offsets” as a separate topic later in this learning guide.

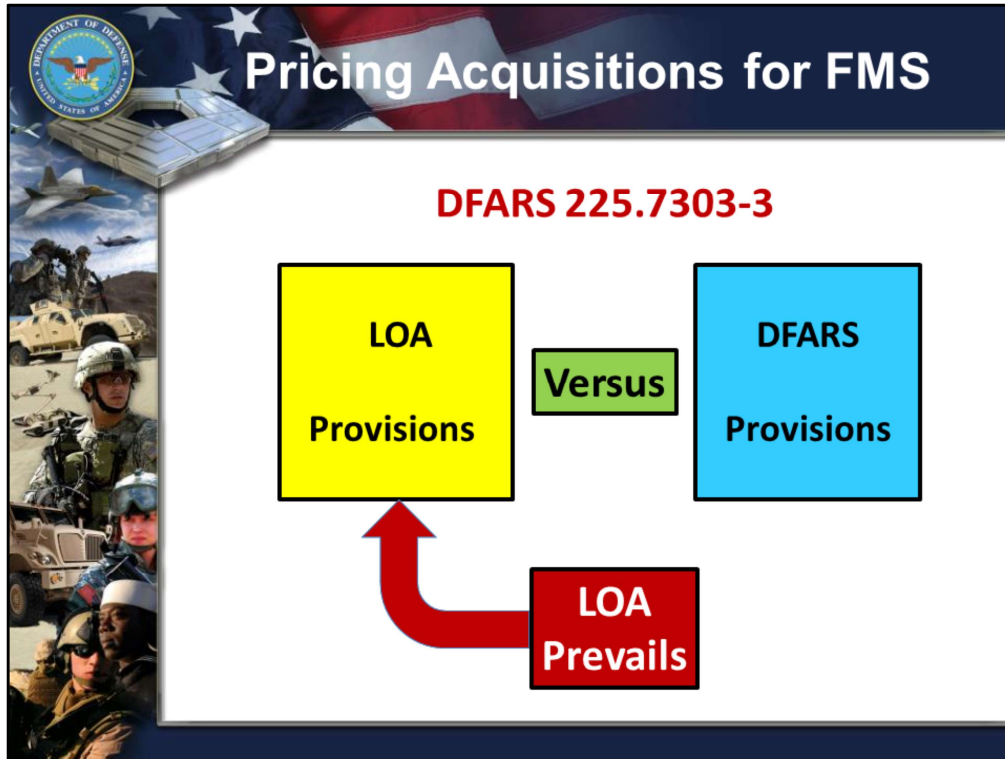
For contracts resulting from LOAs wholly funded by nonrepayable U.S. funds, DFARS subsection 225.7303-5 directs that the same costing basis is to be used as is applicable to procurement of like items purchased by DoD for its own use. Essentially, this states that the special cost rules of DFARS 225.7303-2 do not apply when nonrepayable U.S. funds finance the LOA. The contracting officer can verify the type LOA funds by contacting the implementing agency case manager.



The SAMM C6.3.2 states when foreign governments conduct a competition for a weapon system and a U.S. system is selected, that competition should determine the price to be paid. This is true even if the sale is then processed as a foreign military sale and even if DoD is buying the same item sole source.

DFARS 225.7303(b) reiterates this policy by stating that if the foreign government has conducted a competition resulting in adequate price competition (see FAR 15.403-1(b)(1)), the contracting officer shall not require the submission of certified cost or pricing data. The contracting officer should consult with the foreign government through security assistance personnel to determine if adequate price competition has occurred. This consultation can be through the FMS case manager to the applicable U.S. Office of Defense Cooperation in the partner country.

DFARS 225.7303-1 states that if the contractor has made sales of the item required for FMS to foreign customers under comparable conditions, including quantity and delivery, to price the FMS contract in accordance with FAR Part 15 (Contracting By Negotiation).



This is a short section which states that if a government-to-government agreement between the United States and a foreign government for the sale, coproduction, or cooperative logistic support of a specifically defined weapon system, major end item, or support item, contains language in conflict with the provisions of DFARS 225.7303 pricing section, the language of the government-to-government agreement prevails.

This again highlights the need for the contracting community to participate in the development of the LOA to ensure that the LOA does NOT commit the U.S. to a course of action that is not consistent with and executable per the FAR and DFARS provisions.



Pricing Acquisitions for FMS

DFARS 225.7304(h) & SAMM C6.3.6.1


- Contracting officer shall, after consultation with the contractor, provide:
 - Sufficient data to demonstrate the reasonableness of the contract price
 - Reasonable responses to FMS customer questions concerning contract price
- Data may include tailored responses, top-level pricing summaries, historical prices, or an explanation of significant differences between the contract price and the LOA estimated price

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Per the DFARS subsection 225.7304(h) and SAMM C6.3.6.1, the contracting officer is responsible to provide the FMS customer information that demonstrates the reasonableness of the contract price and to provide reasonable responses to relevant FMS customer questions concerning the contract price.

The data provided to the FMS customer may include tailored responses, top-level pricing summaries, historical prices, or an explanation of any significant differences between the actual contract price and the estimated contract price included in the initial LOA.





FMS Contracting Topics

Topic	SAMM Acquisition C6.3	DFARS Subpart Acquisition for FMS 225.73	Other SAMM Reference
Authorities/Scope	C6.3.1	7300	
Preparing Solicitations & Contracts with FMS		7301	
Contracting Officer Role in LOA Preparation		7302	C5.4.12
Pricing	C6.3.2	7303	
FMS Customer Involvement	C6.3.5	7304(b)	
Other than Full & Open Competition	C6.3.4	7304(a)	
Offsets	C6.3.9	7306 & 7303-2	
Contingent Fees	C6.3.7	7303-4	
Warranties	C6.3.8	7304(b)(3)	
Contract Clauses	C6.3.3	7307	
Limitation of Liability		7305	C5.F4
FMS Customer Contractual Data Requests	C6.3.6	7304(h)	



Customer Involvement In Contracting

SAMM C6.3.5

- Conduct discussions with the FMS purchaser **during LOA development** to ensure requirements are clear and understood
- Based on the LOA information, contracting officer should be able to negotiate and award contract without further customer involvement

The SAMM states that discussions should be held with the purchaser during the development of the LOA and prior to actual implementation to ensure customer's requirements are clear and understood.

The implementing agency should ensure that sufficient details are included in the LOA to allow the U.S. contracting officer to negotiate and award a contract without requiring foreign country representation or direct involvement in the formal negotiation process. In order to achieve this outcome, the respective FMS case manager must communicate with the contracting officer during LOA development.



Customer Involvement In Contracting


SAMM C6.3.5

- In competitive awards, FMS purchaser cannot direct source selection decisions
 - Option of FMS customer to direct sole source process
 - LOA condition 1.2: Without sole source direction, contract source selection is responsibility of the USG
- During the contract process, the contracting officer should consult with the FMS purchaser on:
 - Major contractual matters
 - Issues inconsistent or significantly different than LOA

In competitive contract awards, the DoD does not accept directions from the FMS purchaser as to source selection decisions or contract terms with the exception of customer requested special contract provisions or warranties. Also, the FMS purchaser is not permitted to interfere with a prime contractor's placement of its subcontracts.

The DoD may honor a FMS purchaser's sole source request for the designation of a particular prime or subcontract source for defense articles or defense services. More information on the sole source process will be covered later in this learning guide.

During the contracting process between the contractor and the DoD, the contracting officer should consult with the FMS purchaser about major contractual matters, especially any matter that could be perceived as inconsistent with or significantly different from the LOA.



Customer Involvement In Contracting

SAMM C6.3.5

- FMS customer can request a redacted version of the Statement of Work as information only
 - 30 days for FMS customer to comment on areas where they can identify significant deviation from the LOA
- Contractor proprietary data cannot be released without contractor authorization
- FMS customer requests to reject bids or proposals will not be honored

Upon the purchaser's request, the contracting officer may and at his or her discretion, provide the purchaser a version of the Statement of Work that redacts any information companies deem proprietary, and any information that cannot be released under technology security and foreign disclosure policy as information only and not for general comment.

International customers may have 30 days to comment on areas where they can demonstrate that there is a significant deviation from the LOA.

USG personnel should not release any contractor proprietary data, except in those limited cases where the contractor authorizes release of specific data.

Requests by the FMS purchaser for rejection of any bid or proposal will not be honored.



Customer Involvement In Contracting

SAMM C6.3.5 & DFARS 225.7404

FMS customers should be encouraged to participate with U.S. acquisition personnel in discussions with industry regarding:

- Technical Specifications
- Delivery Schedules
- Special Warranty Provisions
- Unique Requirements
- Impact of alternative quantities or options



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Both the SAMM and the DFARS state that FMS customers should be encouraged to participate with USG acquisition personnel in discussions with industry to develop technical specifications, to establish delivery schedules, identify any special warranty provisions or other requirements unique to the FMS purchaser, and review prices of varying alternatives, quantities, and options needed to make price-performance tradeoffs.

This is important policy for all DoD contracting officers to know. Recall that the U.S. wants to build and strengthen relationships with international partners to support both U.S. national security and U.S. foreign policy objectives. By permitting FMS customer participation in the acquisition process, the DoD acquisition community leverages their set of contracting and business type activities as channel to build relationships with the acquisition communities of the partner nations. Additionally, FMS customer involvement in the acquisition process helps to build confidence and satisfaction with the FMS program.

This customer involvement policy emphasizes the point you will see at the end of this learning module which is that the value the contracting community brings to FMS is more than just obtaining articles and service from contracted sources. The value produced by the contracting community is also about utilizing the acquisition process itself to further build the relationship with the international partner.



Customer Involvement In Contracting

SAMM C6.3.5 & DFARS 225.7404

- Degree of participation in contract negotiations is left to the **discretion of the contracting officer** after consultation with the contractor.
- Contracting officer shall explain to the FMS customer the limits of participation for situations where:
 - Requirements are for more than one FMS customer
 - Contract includes unique U.S. requirements
 - Contractor proprietary data is involved

Both the SAMM and the DFARS state that the degree of FMS purchaser participation during contract negotiations is left to the discretion of the contracting officer after consultation with the contractor.

The DFARS states that the contracting officer shall explain to the FMS customer the limits of participation. Factors that may limit FMS customer participation include situations where-

- (1) The contract includes requirements for more than one FMS customer;
- (2) The contract includes unique U.S. requirements; or
- (3) Contractor proprietary data is involved.



FMS Customer Participation

DSCA Policy Memo 09-60

We have customers who are interested in actively participating in FMS acquisitions, but **believe they are being summarily shut out of the process**. I request that you encourage each of your acquisition communities to take up the spirit of DFARS 225.7304 and **actively seek opportunities for customer participation** in DoD acquisitions for FMS.


Jeffrey A. Wieringa
Vice Admiral, USN
DSCA Director

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The issue of FMS customer participation in the DoD contracting process is important to DoD leadership. As the former DSCA director, Vice Admiral Wieringa, travelled around the world and met with senior level international partner counterparts, he found that many senior level partner decision makers had an interest in actively participating in the FMS acquisition process but were discouraged by their perception that the DoD acquisition community was summarily shutting them out of the process.

As a result, the DSCA director issued a policy letter to the FMS implementing agencies to highlight this problem and to encourage the acquisition community to actively seek opportunities for customer participation as outlined in DFARS 225.7304. The entire policy memo is available at: <http://www.samm.dsca.mil/policy-memoranda/dsca-09-60> .

Once again, the DoD acquisition community is encouraged to view their contracting role as more than just an internal USG procurement process to deliver articles and services to FMS purchasers. The acquisition process itself is also an opportunity to build relationships as well as confidence and transparency in the FMS process.



FMS Customer Participation

OUUSD AT&L DPAP Memo, 21 July 2011

The FMS program is... an instrument of U.S. foreign policy... to deter and defend against aggression, facilitate common defense and strengthen the security of the U.S..

Many FMS customers have voiced interest in actively participating in FMS acquisitions. I ask that you seek opportunities to enhance FMS customer involvement in your acquisition programs in order to foster better understanding, strengthen alliances, provide transparency, and build customer confidence and teamwork.

Richard Ginman
Director - DPAP

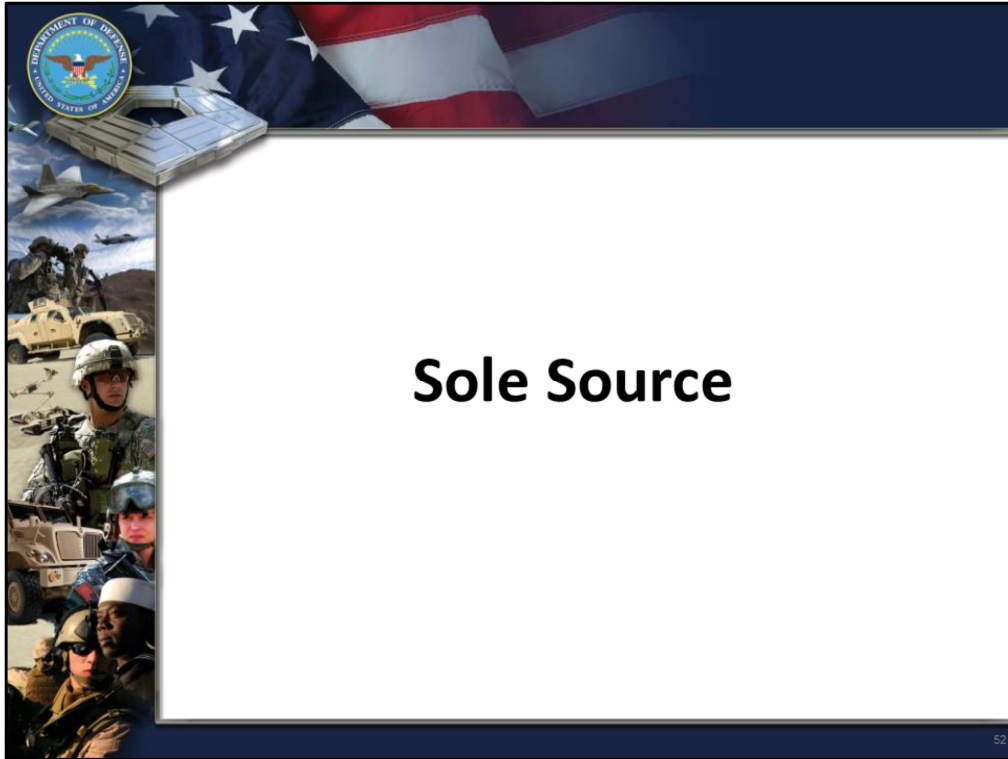
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To further highlight the importance of permitting FMS customer participation in DoD's contracting process, the DoD Director of Defense Procurement and Acquisition Policy (DPAP), Mr. Richard Ginman, issued a July 2011 policy memo to the acquisition organizations of the military departments on the subject of "Customer Involvement in Foreign Military Sales (FMS) Acquisitions".


The full DPAP policy memo can be viewed at:
<http://www.acq.osd.mil/dpap/policy/policyvault/USA004292-11-DPAP.pdf>

This memo highlights the DFARS 225.7304 areas that are available for FMS partner participation. The letter then asks that opportunities be sought out to enhance FMS customer involvement in acquisition programs. Several positive outcomes of FMS customer involvement are listed. These include to foster better understanding, strengthen alliances, provide transparency, and build customer confidence and teamwork.

In making the FMS customer participation decisions, it is recognized that FMS customer involvement may not make the contracting officer's job easier, faster or even qualitatively better. However; the contracting community's willingness to make positive efforts to find ways to permit FMS customer involvement will produce valuable benefits to the USG beyond just the procurement activity itself.




Sole Source



FMS Contracting Topics

Topic	SAMM Acquisition C6.3	DFARS Subpart Acquisition for FMS 225.73	Other SAMM Reference
Authorities/Scope	C6.3.1	7300	
Preparing Solicitations & Contracts with FMS		7301	
Contracting Officer Role in LOA Preparation		7302	C5.4.12
Pricing	C6.3.2	7303	
FMS Customer Involvement	C6.3.5	7304(b)	
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Offsets	C6.3.9	7306 & 7303-2	
Contingent Fees	C6.3.7	7303-4	
Warranties	C6.3.8	7304(b)(3)	
Contract Clauses	C6.3.3	7307	
Limitation of Liability		7305	C5.F4
FMS Customer Contractual Data Requests	C6.3.6	7304(h)	



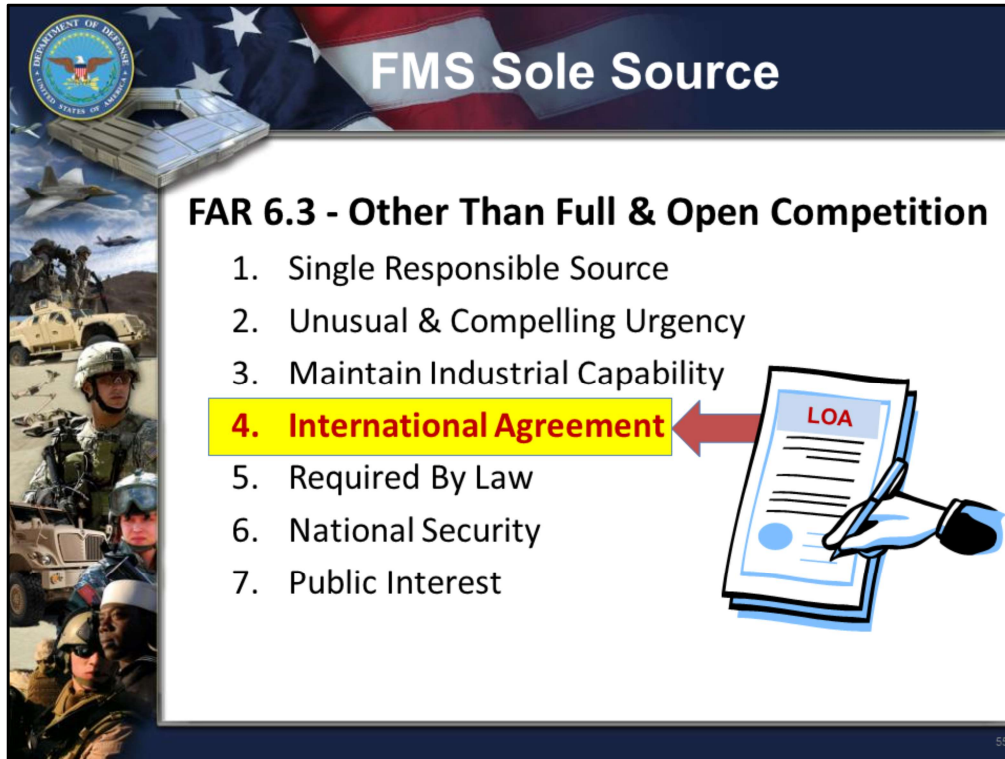
The graphic features a dark blue header with the title "FMS Acquisition Policy" in white. On the left, there is a vertical strip of images: the Department of Defense seal, a satellite dish, a fighter jet, and soldiers in a desert environment. In the center, a blue binder labeled "SAMM Security Assistance Management Manual" is shown, with a tab labeled "Acquisition C6.3". To the right of the binder is a numbered list of nine items. The fourth item, "Other than Full & Open Competition", is highlighted in red. At the bottom, the website URL "http://www.dsca.mil/samm/" is displayed in blue. A small number "54" is in the bottom right corner.

FMS Acquisition Policy

1. FAR / DFARS Authority
2. Cost / Pricing Data
3. Incentive Clauses
4. **Other than Full & Open Competition**
5. Purchaser Involvement
6. Contractual Data Requests
7. Contingent Fees
8. Warranties
9. Offsets

<http://www.dsca.mil/samm/>


The SAMM states that the competitive procurement process is used to the maximum extent possible when procuring articles or services. However, the SAMM also recognizes that the Competition in Contracting Act (CICA) provides certain limited circumstances in which the contracting activity can consider FMS purchaser requests for procurement using other than full and open competition. Historically in the FMS environment, the term “sole source” has been applied to FMS customer requested procurements under “Other than Full and Open Competition”.

The slide features a dark blue header with the text "FMS Sole Source" in white. On the left, there is a vertical strip of images: the Department of Defense seal, a satellite, a fighter jet, and soldiers in a desert environment. The main content area is white and contains the title "FAR 6.3 - Other Than Full & Open Competition" in bold. Below the title is a numbered list of seven exceptions. The fourth item, "4. International Agreement", is highlighted in a yellow box. To the right of the list, a red arrow points from a document labeled "LOA" (Letter of Offer and Acceptance) to the highlighted item. The document is being signed by a hand holding a pen. The number "55" is in the bottom right corner.

FMS Sole Source

FAR 6.3 - Other Than Full & Open Competition

1. Single Responsible Source
2. Unusual & Compelling Urgency
3. Maintain Industrial Capability
- 4. International Agreement**
5. Required By Law
6. National Security
7. Public Interest

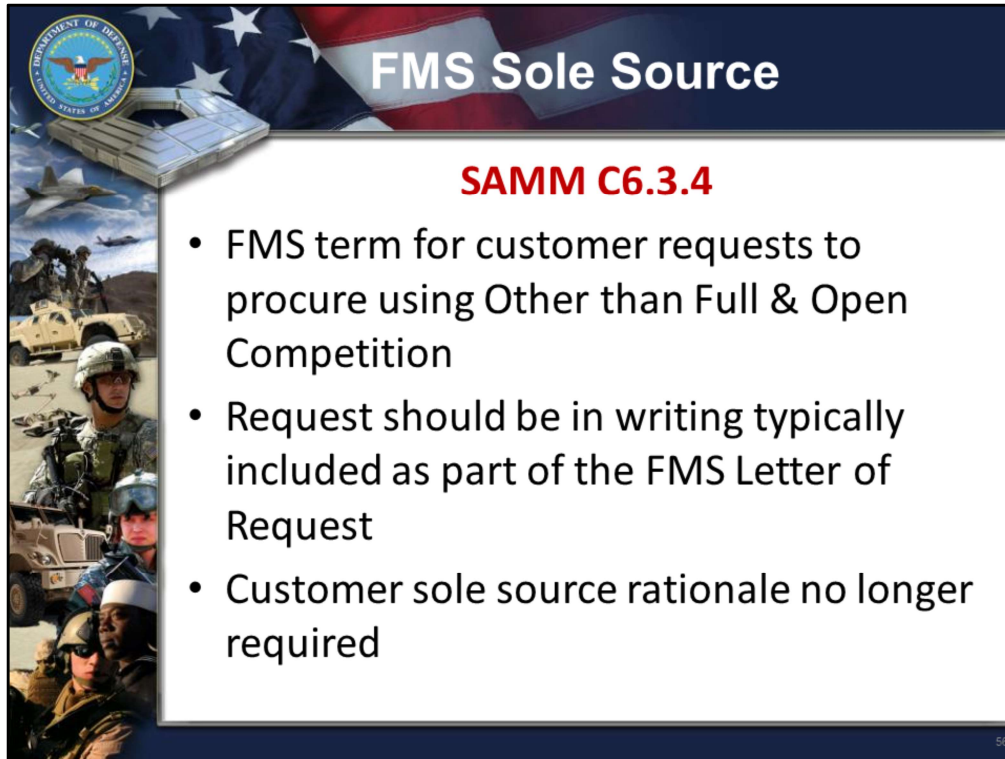


The FAR 6.3 prescribes policies and procedures for contracting without providing for full and open competition. FAR 6.302 identifies the seven potential exceptions to contract without providing for full and open competition. The fourth exception cited is FAR 6.302-4 based on an international agreement.

FAR 6.302-4 states that full and open competition need not be provided for when precluded by the terms of an international agreement or a treaty between the U.S. and a foreign government or international organization, or the written directions of a foreign government reimbursing the agency for the cost of the acquisition of the supplies or services for such government. This authority may be used in circumstances such as when a contemplated acquisition is to be reimbursed by a foreign country that requires that the product be obtained from a particular firm as specified in official written direction such as a Letter of Offer and Acceptance (LOA).

Per **DFARS 206.302-4(c)**, the justifications and approvals described in FAR 6.303 and 6.304 are not required if the head of the contracting activity prepares a document that describes the written directions, such as a Letter of Offer and Acceptance, that have the effect of requiring the use of other than competitive procedures for the acquisition.

The FMS sole source policy of the SAMM is consistent with the "Other than Full and Open Competition" policy of the FAR. Based upon the specific vendor or vendors being cited in the LOA, DoD contracting officers can exercise the FAR 6.302-4 "International Agreement" justification to procure using other than full and open competition.

The slide features a dark blue header with the text "FMS Sole Source" in white. To the left of the text is a collage of military-related images: the Department of Defense seal, a satellite dish, a fighter jet, and soldiers in a desert environment. Below the header, the text "SAMM C6.3.4" is displayed in red. A bulleted list follows, detailing the FMS sole source process. The slide number "56" is visible in the bottom right corner.

FMS Sole Source

SAMM C6.3.4

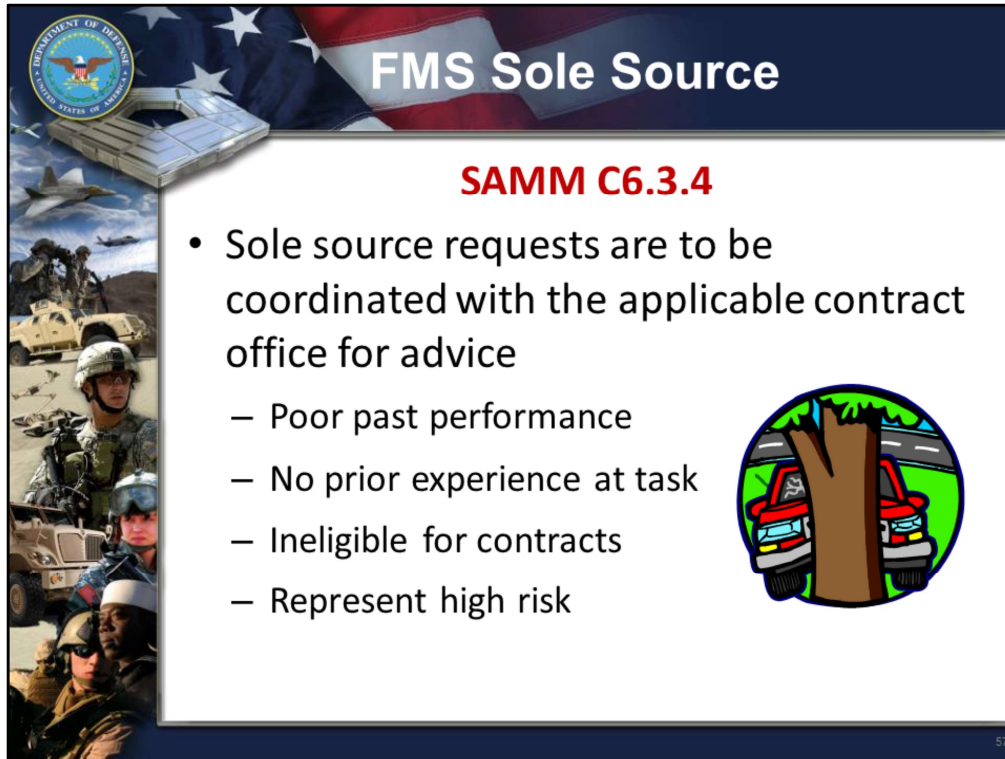
- FMS term for customer requests to procure using Other than Full & Open Competition
- Request should be in writing typically included as part of the FMS Letter of Request
- Customer sole source rationale no longer required

As stated earlier, in the FMS environment, the term “sole source” is typically applied to FMS customer requests for “Other than Full and Open Competition”.

The SAMM permits FMS customers to identify specific vendors to be used in specific LOA procurements based on the provisions of FAR 6.302-4. The FMS sole source process provides an avenue for international partners to accomplish their own source selection process but still utilize the FMS program as the actual acquisition method.

Requests for sole source should be submitted in writing by an authorized official of the purchasing government. This written request for sole source is typically included within the original Letter of Request for the new LOA. FMS purchasers can request that sole source procurement be added to an existing LOA which will be incorporated into the LOA by an LOA amendment. Potentially, sole source could be added to an LOA by a modification if the official requesting the sole source is the same official who requested the LOA, his or her replacement, or an official known to have equivalent or greater authority than the official who signed the LOA.


Prior to August 2012, FMS customers were required to provide a rationale to support their sole source requests. In Aug 2012, the policy was revised to no longer require FMS customer justifications for sole source.

The slide features a dark blue header with the text "FMS Sole Source" in white. To the left of the header is a vertical strip of images: the Department of Defense seal, a satellite, a fighter jet, and soldiers in a desert environment. The main content area is white and contains the title "SAMM C6.3.4" in red, followed by a bulleted list of four criteria for sole source requests. To the right of the list is a circular cartoon illustration of a tree with two cars stuck behind it. The number "57" is in the bottom right corner.

FMS Sole Source

SAMM C6.3.4

- Sole source requests are to be coordinated with the applicable contract office for advice
 - Poor past performance
 - No prior experience at task
 - Ineligible for contracts
 - Represent high risk




The SAMM directs FMS case managers to coordinate with the applicable contracting office for advice regarding a FMS customer's sole source request. FMS case managers typically do not possess the personal knowledge and do not have access to DoD contract data to make an objective assessment of an FMS customer's sole source request. The DoD contracting community does have the knowledge, experience and data access to make an objective evaluation of a FMS customer's sole source request and provide advice. This policy is intended to leverage the extensive range and depth of DoD contracting expertise as a value added feature of the FMS program to the benefit of international partners.

Potential high risk sole source situations could involve requested contractors that:

1. Have poor past performance
2. Have no prior experience at the specific contract task
3. Are ineligible for contracts

4. For other reasons, represent high risk

All approved sole source requests will result in the specific vendor or vendors, as requested by the FMS purchaser, being named within the LOA itself. An LOA note titled "Procurement Using Other Than Full and Open Competition" will identify both written reference of the FMS purchaser's request and the specific name of the requested company.




FMS Sole Source

DFARS 225.7304 (a)

- FMS customers may request a defense article or service be obtained from a particular contractor or subcontractor
- The contracting officer shall honor such FMS customer requests if the LOA fulfills the requirements of FAR Subpart 6.3

FAR 6.3
- International Agreement




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The DFARS 225.7304(a) also discusses FMS sole source. The DFARS states that FMS customers may request that a defense article or defense service be obtained from a particular contractor or subcontractor. The contracting officer shall honor such requests from the FMS customer only if the LOA or other written direction fulfills the requirements of the FAR Subpart 6.3. In such cases, the FAR 6.302-4 provides authority to contract without full and open competition.



Offsets



FMS Contracting Topics

Topic	SAMM Acquisition C6.3	DFARS Subpart Acquisition for FMS 225.73	Other SAMM Reference
Authorities/Scope	C6.3.1	7300	
Preparing Solicitations & Contracts with FMS		7301	
Contracting Officer Role in LOA Preparation		7302	C5.4.12
Pricing	C6.3.2	7303	
FMS Customer Involvement	C6.3.5	7304(b)	
Other than Full & Open Competition	C6.3.4	7304(a)	
Offsets	C6.3.9	7306 & 7303-2	
Contingent Fees	C6.3.7	7303-4	
Warranties	C6.3.8	7304(b)(3)	
Contract Clauses	C6.3.3	7307	
Limitation of Liability		7305	C5.F4
FMS Customer Contractual Data Requests	C6.3.6	7304(h)	



Offset Definition


Commercial compensation practices **demanded** by a foreign purchaser and agreed to by a contractor that **obligate the contractor** to perform actions that will **“Offset”** the **outflow** of money.


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An offset is a package of additional benefits that a contractor agrees to provide in addition to delivering the primary product or service. Offsets generally apply only to acquisitions of major systems. In the international marketplace, there are numerous armaments producers competing to sell their systems to prospective purchasers. When a country makes the decision to procure a major foreign system, significant amounts of national funds flow out of that country's economy. Given the cost of today's modern systems, the cash outflow may involve hundreds of millions or even billions of dollars.

As a result, purchasing countries often desire to leverage this huge foreign expenditure to obtain additional benefits for their nation in addition to acquiring the weapon system itself. This package of additional benefits, which is intended to compensate for the huge financial outflow, is referred to as an "offset." The name is derived from the fact that the "additional benefits" help to "offset" the major cash outflow from the purchasing country.

Both the SAMM and the DFARS recognize offsets as legitimate, legal business arrangements that occur in the context of international acquisitions.



Types of Offsets

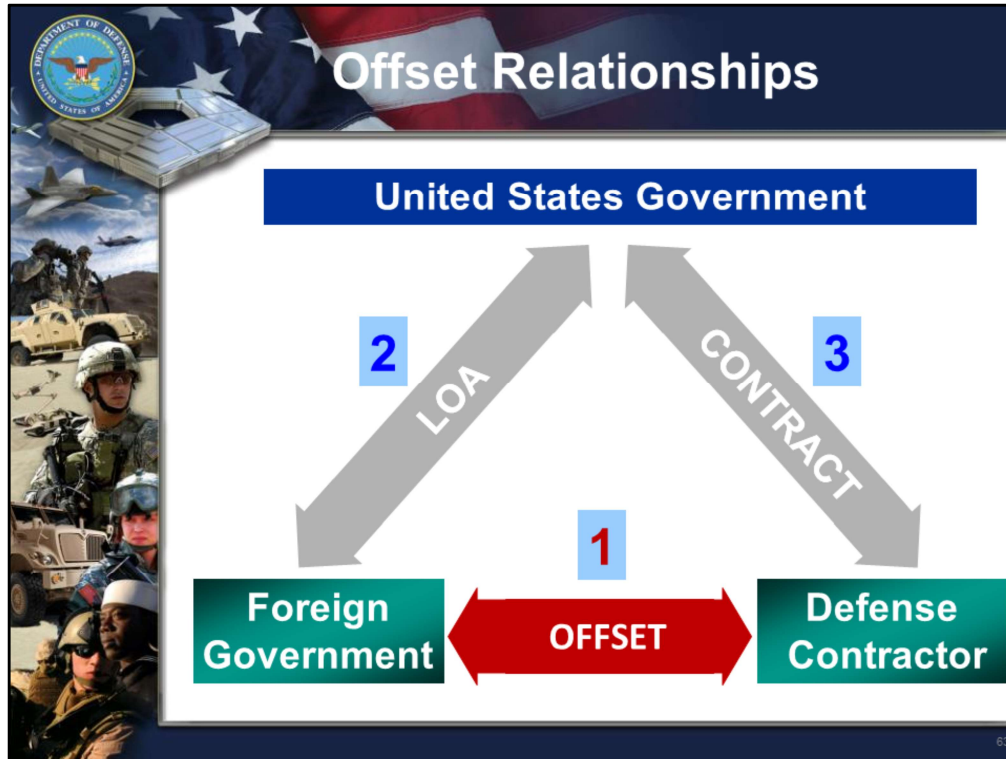
- **Direct** = Compensation in goods related to defense system being sold 
- **Indirect** = Compensation in goods unrelated to the defense system sold 

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Offsets can fundamentally be categorized into two types: direct offsets and indirect offsets.

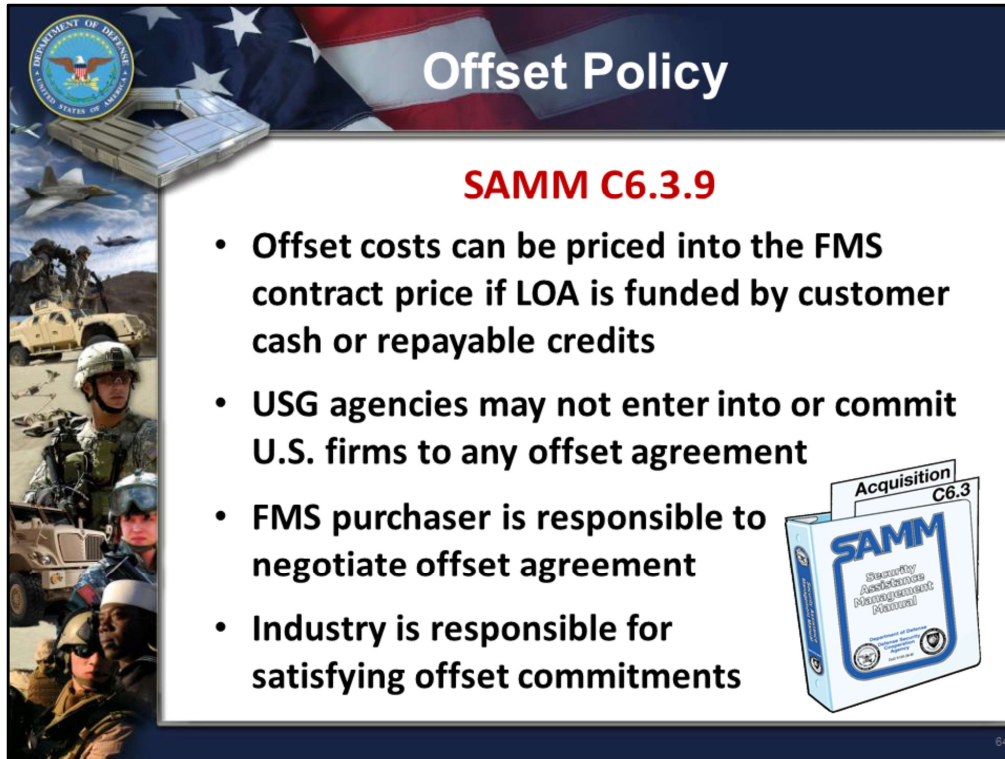
A direct offset is a form of compensation provided to a purchaser that involves goods directly related to the item being purchased. As an example, a U.S. contractor may agree to permit the purchaser to manufacture or assemble certain components or sub-assemblies of the weapon system in-country.

An indirect offset is a form of compensation provided to a purchaser that involves goods which are unrelated to the item being purchased. For example, a contractor may agree to purchase, usually for resale, certain manufactured products, agricultural commodities, raw materials, or services produced by the customer country and resale these products in other markets around the world.



The offset agreement is between the foreign government and the respective defense contractor. The USG is not a party or participant in the offset agreement itself. Typically, the offset discussions and agreements between the foreign government and the defense contractor occur pre-Letter of Request (LOR). The offset discussions are often part of the foreign government's overall source selection process when the foreign government is deciding which of potentially several available systems or alternatives to purchase.

Once the foreign government selects the system and submits the LOR, the USG will prepare the LOA. If the foreign government accepts the LOA, the USG will implement the requirements of the LOA through awarding contracts with industry. When offsets are involved, the system requested by the foreign government is typically either requested on a sole source basis from the contractor with the offset agreement or is already a system that is considered to be a single source product from the contractor which has entered into an offset agreement with the FMS purchaser.



Offset Policy

SAMM C6.3.9

- Offset costs can be priced into the FMS contract price if LOA is funded by customer cash or repayable credits
- USG agencies may not enter into or commit U.S. firms to any offset agreement
- FMS purchaser is responsible to negotiate offset agreement
- Industry is responsible for satisfying offset commitments

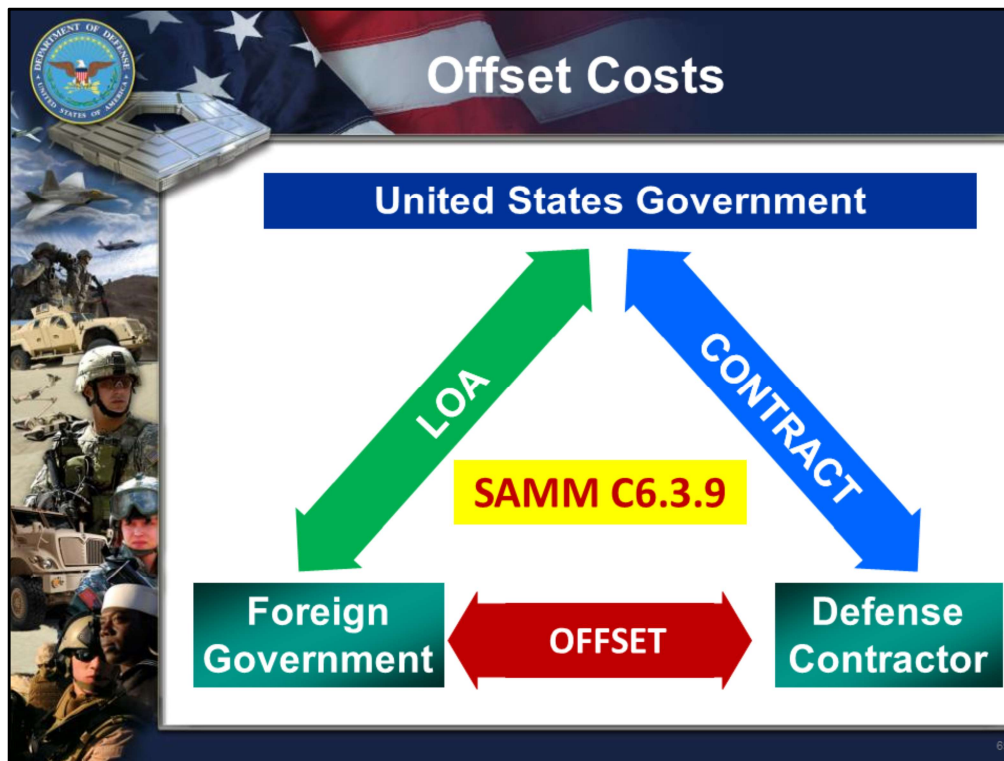
Acquisition C6.3
SAMM
Security Assistance Management Manual

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SAMM C6.3.9 describes the policy on offsets associated with FMS sales.

U.S. contractors can recover costs of any offsets that are associated with those contracts if the FMS contracts are based on LOAs financed wholly by purchaser cash or repayable FMF credits. Non-repayable FMF credits may not be used to pay any costs associated with offset agreements.

USG agencies may not enter into or commit U.S. firms to any offset agreement. Any foreign purchaser requesting offset arrangements in conjunction with FMS should be informed that the responsibility for negotiating offset arrangements and satisfying all related commitments resides with the U.S. firm involved.

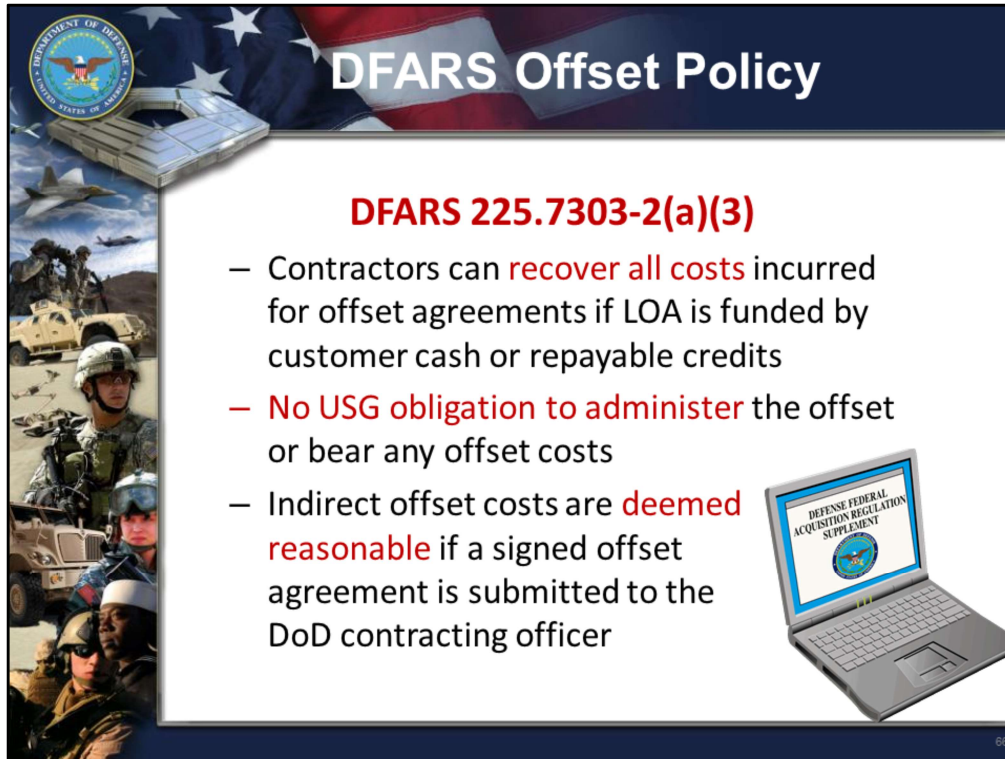


It is the contractor's responsibility to inform the IA when estimated offset costs are included in the FMS pricing information that the contractor has provided. The contractor must disclose the amount of the estimated offset costs included the price to the USG contracting officer.

Offset costs, provided by industry, should be included as part of the line item(s) unit cost in P&A data and in estimated prices quoted in the LOAs. The costs should be included before transmittal of the LOA for acceptance. Requests to include costs after LOA acceptance require an LOA Modification or Amendment. An offset note is included on the LOA.

It is inappropriate for USG personnel to discuss with the purchaser the nature or details of an offset arrangement. However, if known, the fact that offset costs have been included in the P&A or LOA price estimate may be confirmed, should the purchaser inquire. The purchaser should be directed to the U.S. contractor for answers to all questions associated with offset agreements, including questions regarding their costs. IA involvement in any discussion of offset costs (beyond confirmation of the inclusion of these costs in price estimates) must be avoided.

It is the responsibility of the IA to specify to DSCA, in the transmittal of any Congressional Notification, in the LOA and in any subsequent LOA Modification or Amendments, whether offset costs have been or will be included, and the amount, if known.

A graphic titled "DFARS Offset Policy" featuring a collage of military-related images on the left: the Department of Defense seal, a satellite, a fighter jet, soldiers in a desert, and a tank. On the right, a laptop displays the "DEFENSE FEDERAL ACQUISITION REGULATION SUPPLEMENT" logo. The background is a stylized American flag.

DFARS Offset Policy

DFARS 225.7303-2(a)(3)

- Contractors can **recover all costs** incurred for offset agreements if LOA is funded by customer cash or repayable credits
- **No USG obligation to administer** the offset or bear any offset costs
- Indirect offset costs are **deemed reasonable** if a signed offset agreement is submitted to the DoD contracting officer

DFARS 225.7303-2(a)(3) describes the policy regarding offsets associated with FMS sales. DFARS states that a U.S. defense contractor may recover all costs incurred for offset agreements with a foreign government or international organization if the LOA is financed wholly with customer cash or repayable foreign military finance credits.

Under FMS, the offset requirement is not a deliverable item or service being purchased through the USG contract with industry. However, the USG's offset policy permits contractors to factor the cost of industry's offset agreement into the price of the item or service being sold to the USG via the procurement contract. Given that the offset is NOT a contract deliverable item or service, the USG assumes no obligation to satisfy or administer the offset requirement or to bear any of the associated costs.

Additionally, all offset costs that involve benefits provided by the defense contractor to the FMS customer that are unrelated to the item being purchased under the LOA (indirect offset costs) are deemed reasonable for purposes of FAR part 31 with no further analysis necessary on the part of the contracting officer, provided that the defense contractor submits to the contracting officer a signed offset agreement or other documentation showing that the FMS customer has made the indirect offset of a certain dollar value a condition of the FMS acquisition.

FMS customers are placed on notice through the LOA that indirect offset costs are deemed reasonable without any further analysis by the contracting officer.




DFARS Offset Policy

DFARS 225.7306

- DoD does NOT encourage, enter into or commit U.S. firms to FMS offset arrangements
- Decision on offset arrangements are a resides with the respective company
- Industry has responsibility for negotiating and implementing the offset arrangement

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DoD does not encourage, enter into, or commit U.S. firms to FMS offset arrangements. The decision whether to engage in offsets, and the responsibility for negotiating and implementing offset arrangements, resides with the companies involved.



LOA Offset Term & Condition 2.8


The **USG is not a party** to any offset agreements / arrangements that may be **required by the Purchaser** in relation to the sales made in this LOA. The **USG assumes no obligation to administer or satisfy** any offset requirements **or bear any of the associated costs**. To the extent that the Purchaser requires offsets in conjunction with this sale, **offset costs may be included in the price of contracts** negotiated under this LOA. Such costs shall be **determined or deemed** to be reasonable in accordance with Subpart 225.73 of the DFARS. If the Purchaser desires **visibility into these costs**, the Purchaser should **raise this with the contractor** during negotiation of offset arrangements.

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The LOA Standard Term and Condition 2.8 addresses offsets and summarizes the USG policy on offsets associated with FMS sales. LOA Term and Condition 2.8 states:

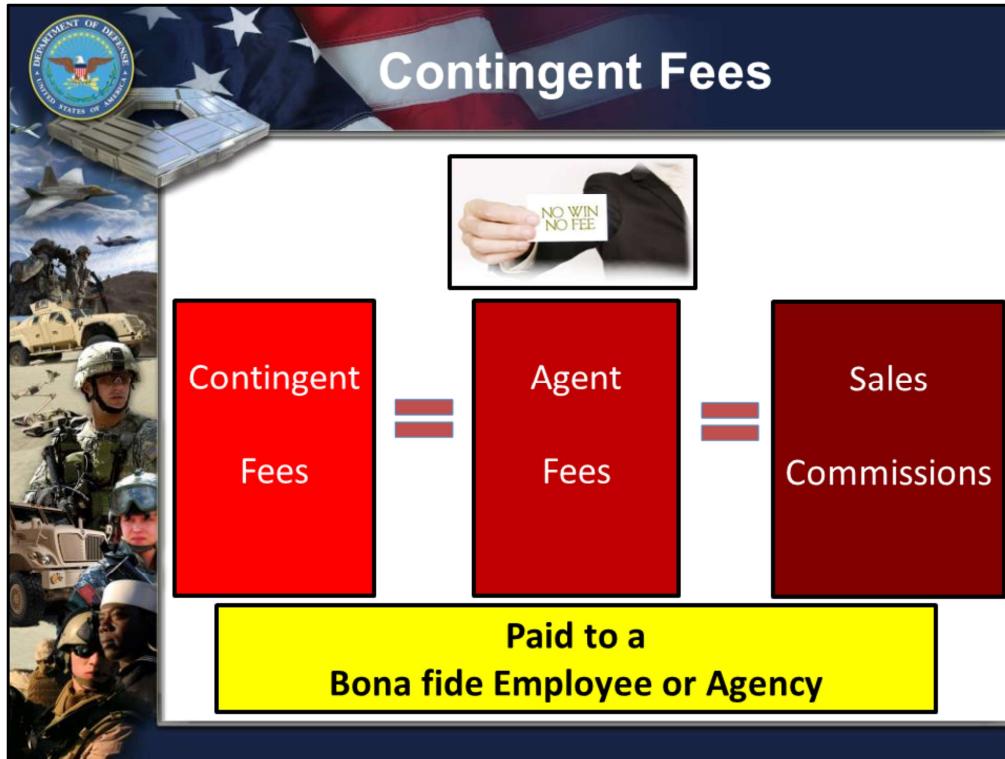
The USG is not a party to any offset agreements/arrangements that may be required by the Purchaser in relation to the sales made in this LOA. The USG assumes no obligation to administer or satisfy any offset requirements or bear any of the associated costs. To the extent that the Purchaser requires offsets in conjunction with this sale, offset costs may be included in the price of contracts negotiated under this LOA. Such costs shall be determined or deemed to be reasonable in accordance with SUBPART 225.73 of the Defense Federal Acquisition Regulation Supplement (DFARS). If the Purchaser desires visibility into these costs, the Purchaser should raise this with the contractor during negotiation of offset arrangements.





FMS Contracting Topics

Topic	SAMM Acquisition C6.3	DFARS Subpart Acquisition for FMS 225.73	Other SAMM Reference
Authorities/Scope	C6.3.1	7300	
Preparing Solicitations & Contracts with FMS		7301	
Contracting Officer Role in LOA Preparation		7302	C5.4.12
Pricing	C6.3.2	7303	
FMS Customer Involvement	C6.3.5	7304(b)	
Other than Full & Open Competition	C6.3.4	7304(a)	
Offsets	C6.3.9	7306 & 7303-2	
Contingent Fees	C6.3.7	7303-4	
Warranties	C6.3.8	7304(b)(3)	
Contract Clauses	C6.3.3	7307	
Limitation of Liability		7305	C5.F4
FMS Customer Contractual Data Requests	C6.3.6	7304(h)	



The terms Contingent Fees, Agent Fees and Sales Commissions are synonymous in this context; however, both the SAMM and the DFARS refer to these fees as “Contingent Fees”.

The FAR Subpart 3.4 defines “Contingent fee” as any commission, percentage, brokerage, or other fee that is contingent upon the success that a person or concern has in securing a Government contract.

Per DFARS 225.7303-4, “Contingent Fees” may potentially be allowable costs in contracts containing FMS.

Per DFARS 225.7303-4, contingent fees are fees paid to a bona fide employee or a bona fide established commercial selling agency maintained by the prospective contractor for the purpose of securing business.




Contingent Fees

FAR 3.401 – Bona fide Agency

An established commercial or selling agency, maintained by a contractor for the purpose of securing business, that neither exerts nor proposes to exert improper influence to solicit or obtain Government contracts nor holds itself out as being able to obtain any Government contract or contracts through improper influence.

FAR 3.402 defines a bona fide agency as an established commercial or selling agency, maintained by a contractor for the purpose of securing business, that neither exerts nor proposes to exert improper influence to solicit or obtain Government contracts nor holds itself out as being able to obtain any Government contract or contracts through improper influence.



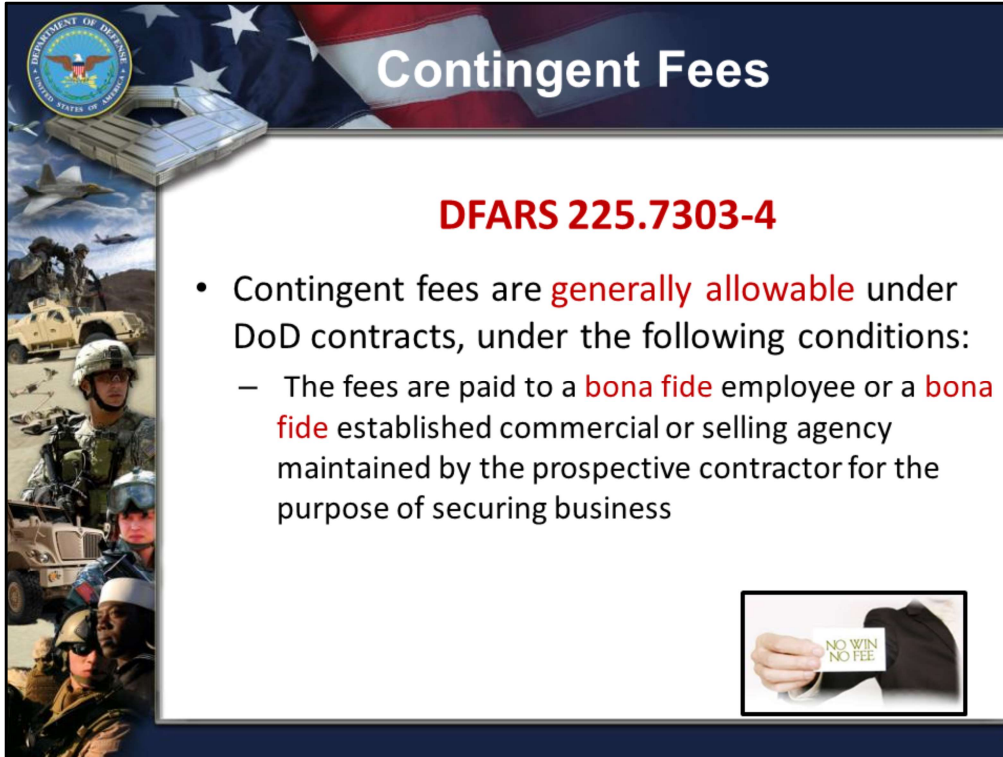
Contingent Fees

FAR 3.401 – Bona fide Employee

A person, employed by a contractor and subject to the contractor's supervision and control as to time, place, and manner of performance, who neither exerts nor proposes to exert improper influence to solicit or obtain Government contracts nor holds out as being able to obtain any Government contract or contracts through improper influence.

FAR 3.402 defines a bona fide employee as a person, employed by a contractor and subject to the contractor's supervision and control as to time, place, and manner of performance, who neither exerts nor proposes to exert improper influence to solicit or obtain Government contracts nor holds out as being able to obtain any Government contract or contracts through improper influence.

The contracting officer uses criteria contained in the FAR Part 31 and FAR Subpart 3.4 to determine if an employee or agent is bona fide.



Contingent Fees


DFARS 225.7303-4

- Contingent fees are **generally allowable** under DoD contracts, under the following conditions:
 - The fees are paid to a **bona fide** employee or a **bona fide** established commercial or selling agency maintained by the prospective contractor for the purpose of securing business

DFARS states that contingent fees are generally allowable under DoD contracts, under the following conditions:

- (1) The fees are paid to a bona fide employee or a bona fide established commercial or selling agency maintained by the prospective contractor for the purpose of securing business
- (2) The contracting officer determines that the fees are fair and reasonable.

Again, the contracting officer uses criteria contained in the FAR Part 31 and FAR Subpart 3.4 to determine if an agent(s) is bona fide.




Contingent Fees

SAMM C6.3.7

**FMS customers must be notified of all
contingent fees associated with an
FMS case **prior to or in conjunction**
with LOA submission to the purchaser**

The SAMM states that FMS purchasers must be advised of all contingent fees associated with an FMS case prior to or in conjunction with LOA submission to the purchaser unless the purchaser has indicated otherwise. Again, this is another reason why contracting officers should be involved with the implementing agency case manager during the LOA development.



Contingent Fees

SAMM C6.3.7

Notification includes:

- Name and address of agent
- Amount of proposed fee
- Percentage of sale price
- DoD statement about the fee
 - DoD considers the fee to be fair and reasonable
 - Portion of proposed fee is considered fair and reasonable
 - USG cannot determine the reasonableness of the proposed fee

The FMS purchaser is to be advised of: the name and address of the agent(s); the estimated amount of the proposed fee, and the percentage of the sale price; and a statement indicating one of three conclusions by DoD. The three options are: 1) appropriate officials of DoD consider the fee to be fair and reasonable; or, 2) a portion of the proposed fee is considered to be fair and reasonable (provide rationale); or 3) the USG cannot determine the reasonableness of the proposed fee.



Contingent Fees

SAMM C6.3.7 & DFARS 225.7303-4

- Certain FMS countries must approve ANY contingent fee regardless of dollar value
 - Australia, Egypt, Greece, Israel, Japan, Jordan, Republic of Korea, Kuwait, Pakistan, Philippines, Saudi Arabia, Taiwan, Thailand, Turkey, and Venezuela
- All other FMS countries must provide approval of any contingent fee exceeding \$50,000 per FMS case
- All contingent fee correspondence with the FMS purchaser must be coordinated with DSCA


Per both the SAMM and the DFARS, the following countries must approve all contingent fees, regardless of dollar value, before the fees can be considered allowable in the FMS contract cost: Australia, Egypt, Greece, Israel, Japan, Jordan, Republic of Korea, Kuwait, Pakistan, Philippines, Saudi Arabia, Taiwan, Thailand, Turkey, and Venezuela.

For all other FMS countries, any contingent fee exceeding \$50,000 per FMS case is unallowable unless the FMS purchaser approves the fee in writing before contract award.

The SAMM requires that all contingent fee correspondence with the FMS purchaser must be coordinated with DSCA.



Warranties for FMS



FMS Contracting Topics

Topic	SAMM Acquisition C6.3	DFARS Subpart Acquisition for FMS 225.73	Other SAMM Reference
Authorities/Scope	C6.3.1	7300	
Preparing Solicitations & Contracts with FMS		7301	
Contracting Officer Role in LOA Preparation		7302	C5.4.12
Pricing	C6.3.2	7303	
FMS Customer Involvement	C6.3.5	7304(b)	
Other than Full & Open Competition	C6.3.4	7304(a)	
Offsets	C6.3.9	7306 & 7303-2	
Contingent Fees	C6.3.7	7303-4	
Warranties	C6.3.8	7304(b)(3)	
Contract Clauses	C6.3.3	7307	
Limitation of Liability		7305	C5.F4
FMS Customer Contractual Data Requests	C6.3.6	7304(h)	



Warranties

SAMM C6.3.8

- Obtain the same warranties for FMS as done for DoD
- FMS purchaser can request specific performance warranties
 - Defense Service paid for on the LOA
 - Warranty described in an LOA note
 - Identify steps to maintain or exercise warranty rights



Per the SAMM, the DoD obtains the same warranties for FMS as it does for itself.

Additionally, the FMS purchaser may request specific performance warranties. These FMS customer requested warranties are provided and paid for on the LOA as a defense service. The respective warranty must be described in an LOA note.

Also, the FMS purchaser must be informed either in the LOA note or by other documentation of any steps necessary to maintain or exercise these additional warranty rights.



Warranties

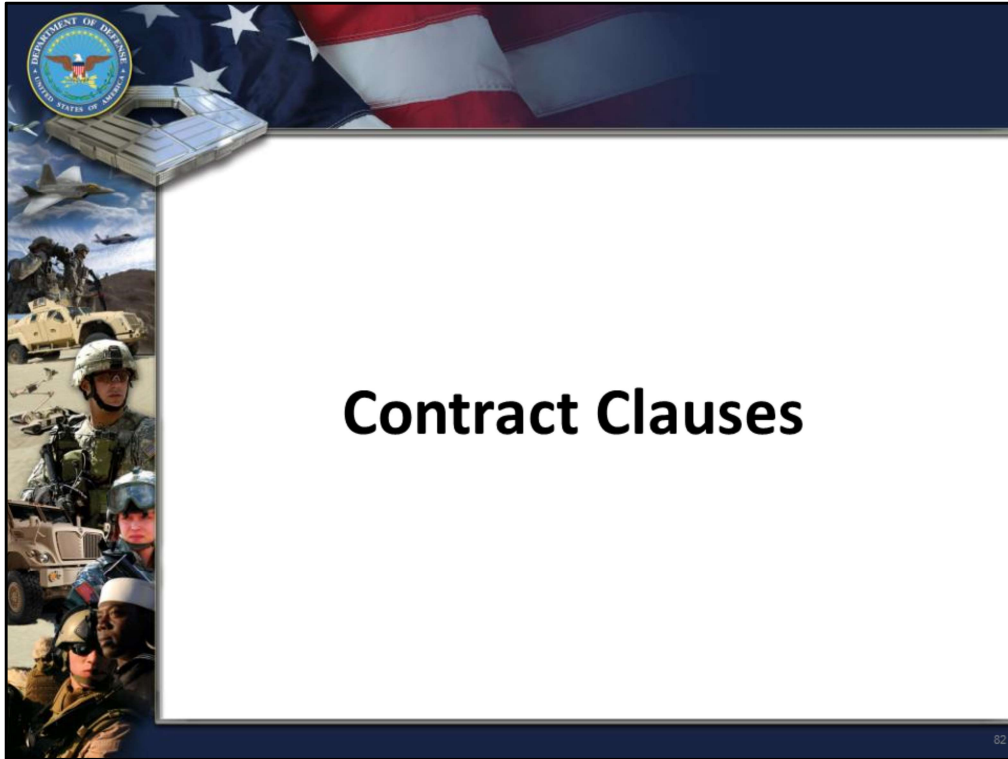
DFARS 225.7304(b)(3) and 225.7304(f)


- FMS customers can participate with DoD personnel in discussions with industry to **identify any special warranty provisions**
- Contracting officers may attempt to **obtain any special warranty provisions** requested by the FMS customer

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DFARS discussion of warranties is contained in the DFARS 227.7304 FMS Customer Involvement section. Here DFARS 225.7304(b)(3) states that FMS customers should be encouraged to participate with U.S. Government acquisition personnel in discussions with industry to identify any special warranty provisions or other requirements unique to the FMS customer.

DFARS 225.7304(f) states that upon timely notice, the contracting officer may attempt to obtain any special contract provisions, warranties, or other unique requirements requested by the FMS customer.





FMS Contracting Topics

Topic	SAMM Acquisition C6.3	DFARS Subpart Acquisition for FMS 225.73	Other SAMM Reference
Authorities/Scope	C6.3.1	7300	
Preparing Solicitations & Contracts with FMS		7301	
Contracting Officer Role in LOA Preparation		7302	C5.4.12
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Limitation of Liability		7305	C5.F4
FMS Customer Contractual Data Requests	C6.3.6	7304(h)	



Contract Clauses

SAMM C6.3.3 – Incentive Clauses

- FMS case manager and Contracting Officer must work together to ensure the **LOA and contract are consistent**
 - Ensure FMS customer desires for early performance stated by incentive clause
- Technical Assistance Agreement not required if LOA and contract contain all information required by an export license



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USG contracts may include incentive clauses for early performance. The SAMM states that any contract incentive clause should be consistent with the FMS customer's requirements as stated in the LOA. The principle behind this policy is that the contractor should only be incentivized to perform in ways that are desired by and actually benefit the FMS customer.

Although early delivery for USG requirements is generally viewed to be a positive action, early delivery for FMS customers is not universally viewed as a positive action. In many FMS scenarios, early performance can prove to be problematic for an FMS purchaser from both a financial and logistics perspective. Early contract performance will drive USG demands for accelerated cash collections and the FMS purchaser may not be prepared to make additional payments to support the early contract performance. Additionally, the FMS purchaser may not be prepared with trained personnel, equipped facilities, and other sustainment support elements necessary to appropriately receive and maintain an early delivered article. Any early contract delivery must be pre-coordinated with the FMS customer to validate that they are prepared to receive the articles.

The SAMM also states that a Technical Assistance Agreement (TAA) in support of a FMS LOA is not required during the period in which the FMS case and implementing USG FMS contracts and subcontracts are in effect if the LOA and the contract contain all of the information normally required by an export license. Under [22 CFR part 126.6](#), the LOA and the implementing contracts serve as the authorization for the transfers without a license, provided the transaction is fully documented.



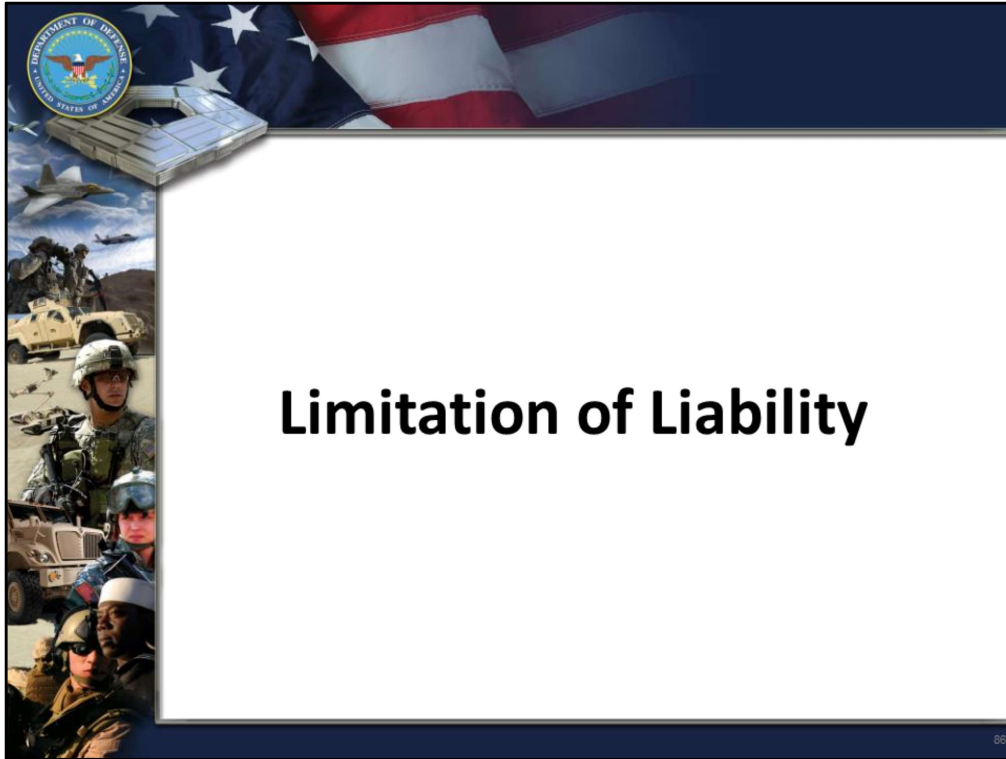
Contract Clauses

DFARS 225.7307


- **Restriction on Contingent Fees for FMS**
 - Use clause 252.225-7027 in solicitations and contracts for FMS
- **Exclusionary Policies and Practices of Foreign Governments**
 - Use clause 252.225-7028 in solicitations and contracts for international military education and FMS supplies and services

DFARS directs to use the following contract clauses for FMS:

- 1) the clause at [252.225-7027](#) regarding “Restriction on Contingent Fees for FMS” in solicitations and contracts that are for FMS.
- 2) the clause at [252.225-7028](#) “Exclusionary Policies and Practices of Foreign Governments” in solicitations and contracts that are for the purchase of supplies and services for international military education training and FMS.




Limitation of Liability



FMS Contracting Topics

Topic	SAMM Acquisition C6.3	DFARS Subpart Acquisition for FMS 225.73	Other SAMM Reference
Authorities/Scope	C6.3.1	7300	
Preparing Solicitations & Contracts with FMS		7301	
Contracting Officer Role in LOA Preparation		7302	C5.4.12
Pricing	C6.3.2	7303	C5.2.1.2
FMS Customer Involvement	C6.3.5	7304(b)	
Other than Full & Open Competition	C6.3.4	7304(a)	
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Limitation of Liability		7305	C5.F4
FMS Customer Contractual Data Requests	C6.3.6	7304(h)	



Indemnification & Assumption of Risk

LOA Standard Terms & Conditions - Section 3: Indemnification & Assumption of Risks

- Purchaser indemnifies and holds harmless USG, its agents, officers, and employees for loss or liability
- Subject to contractual warranties, purchaser relieves USG contractors and subcontractors from liability for loss or damage to the same extent USG would assume for its property if it were procuring items for itself

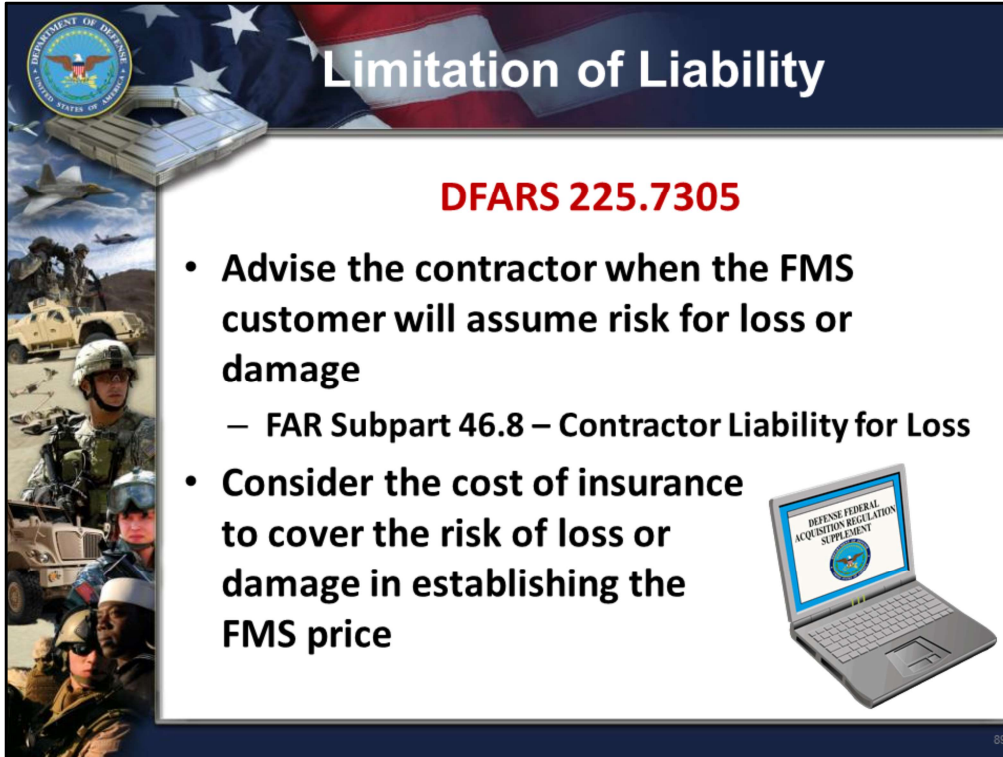
88

A standard set of terms and conditions are included as an official part of each LOA. This set of LOA standard terms and conditions is available in SAMM Figure C5.F4. Section 3 of the standard terms and conditions is titled “Indemnification and Assumption of Risks”. This section states that the FMS purchaser indemnifies the USG. This means that the purchaser agrees to accept the risks of financial liabilities that may arise in the execution of the LOA.

In executing the LOA, the USG conducts business on behalf of the FMS customer in the same manner that the USG conducts business for itself. As a normal business practice, the USG exposes itself to a certain degree of risk. Given the broad range of risks the USG faces, it is less expensive to absorb the occasional loss than it is to purchase insurance to insulate against all these potential risks.

When it comes to executing FMS programs, the USG faces certain risks just like it does while conducting business for itself. Under the LOA, the USG requires the FMS customer to absorb these risks given that these actions are being accomplished for the benefit of the FMS customer.

Under the LOA, the USG is requiring the customer to stand in the USG’s place to face the same level of risk that the USG normally faces in conducting business for itself.



Limitation of Liability

DFARS 225.7305


- **Advise the contractor when the FMS customer will assume risk for loss or damage**
 - FAR Subpart 46.8 – Contractor Liability for Loss
- **Consider the cost of insurance to cover the risk of loss or damage in establishing the FMS price**

This section directs the contracting officer to advise the contractor when the foreign customer will assume the risk for loss or damage under the appropriate limitation of liability clauses and make reference to FAR Subpart 46.8 which is titled “Contractor Liability for Loss of or Damage to Property of the Government”.

The DFARS also directs to consider the costs of necessary insurance, if any, obtained by the contractor to cover the risk of loss or damage in establishing the FMS contract price.

The action identified in this section is based upon the contracting officer knowing the customer’s position on regarding the assumption of certain risks. This again emphasizes the need for contracting officers to participate in the LOA development and in discussions with the international partner to gain an understanding of customer expectations prior to initiating contract actions.





FMS Contracting Topics

Topic	SAMM Acquisition C6.3	DFARS Subpart Acquisition for FMS 225.73	Other SAMM Reference
Authorities/Scope	C6.3.1	7300	
Preparing Solicitations & Contracts with FMS		7301	
Contracting Officer Role in LOA Preparation		7302	C5.4.12
Pricing	C6.3.2	7303	
FMS Customer Involvement	C6.3.5	7304(b)	
Other than Full & Open Competition	C6.3.4	7304(a)	
Offsets	C6.3.9	7306 & 7303-2	
Contingent Fees	C6.3.7	7303-4	
Warranties	C6.3.8	7304(b)(3)	
Contract Clauses	C6.3.3	7307	
Limitation of Liability		7305	C5.F4
FMS Customer Contractual Data Requests	C6.3.6	7304(h)	



FMS Customer Contractual Data Requests

SAMM C6.3.6.1 – Pricing Information

Contracting Officer should, after consulting with contractor, provide sufficient information to **demonstrate the reasonableness** of price

- Tailored responses
- Top level pricing summaries
- Historical prices
- Explanation of significant difference between actual contract price and estimated LOA price

If the purchaser requests additional information concerning FMS contract prices, the contracting officer should, after consultation with the contractor, provide sufficient information to demonstrate the reasonableness of the price and reasonable responses to relevant questions concerning contract price. This may include tailored responses, top level pricing summaries, historical prices, or an explanation of any significant differences between the actual contract prices and the estimated contract price included in the initial LOA price.



FMS Customer Contractual Data Requests

SAMM C6.3.6.2 – Contractual Documents

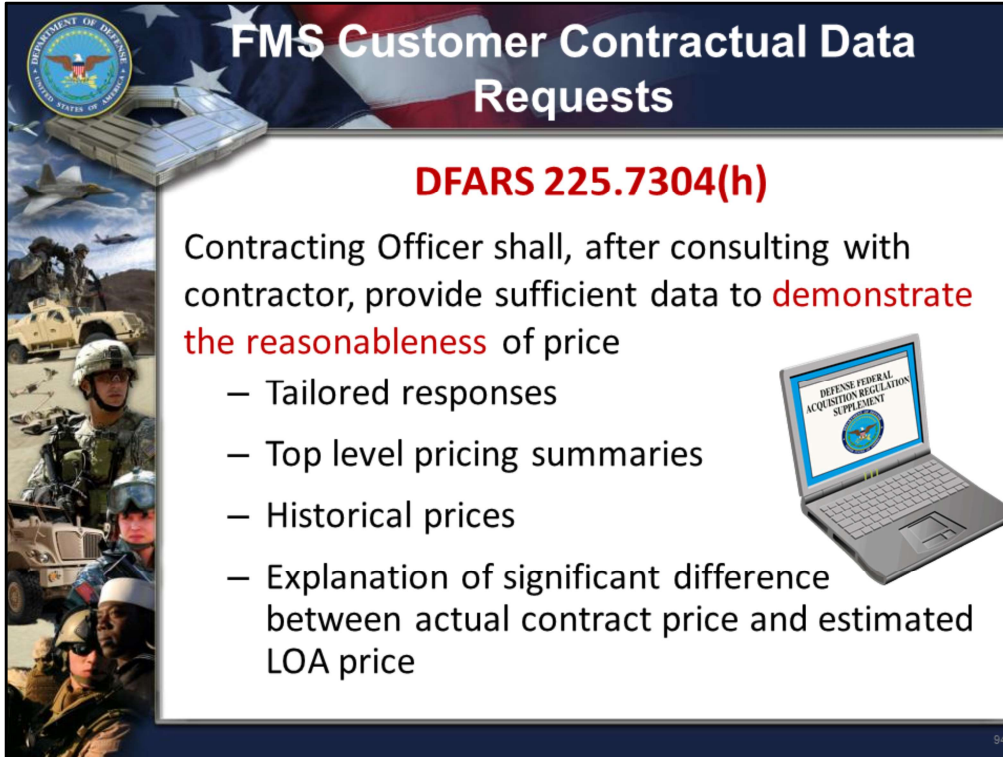
- LOA serves as the sales agreement between the FMS customer and the DoD
- No need to provide the procurement contract with industry to the FMS purchaser
- Contract release may be considered when:
 - Unclassified
 - Only the respective FMS country's requirements on contract
 - Internal USG documentation regarding price or negotiation NOT releasable
- Forward questions to DSCA Office of General Counsel

The SAMM states that all pertinent information and contractual obligations between the DoD and the purchaser are identified in the LOA. As a result, there is no need to provide a copy of the contract to the FMS purchaser.

However, if the contract is unclassified and only includes requirements for the requesting country, release can be considered subject to restrictions on release of contractor proprietary information. Releasable information does not include internal documentation such as negotiation or pricing memoranda.

If the contract is classified, contains USG requirements (which per DFARS 225.7303 may be priced differently), or contains other purchaser requirements, release is not authorized.

Any questions or requests for exceptions to these provisions must be forwarded to DSCA (Office of the General Counsel).



FMS Customer Contractual Data Requests

DFARS 225.7304(h)

Contracting Officer shall, after consulting with contractor, provide sufficient data to **demonstrate the reasonableness** of price

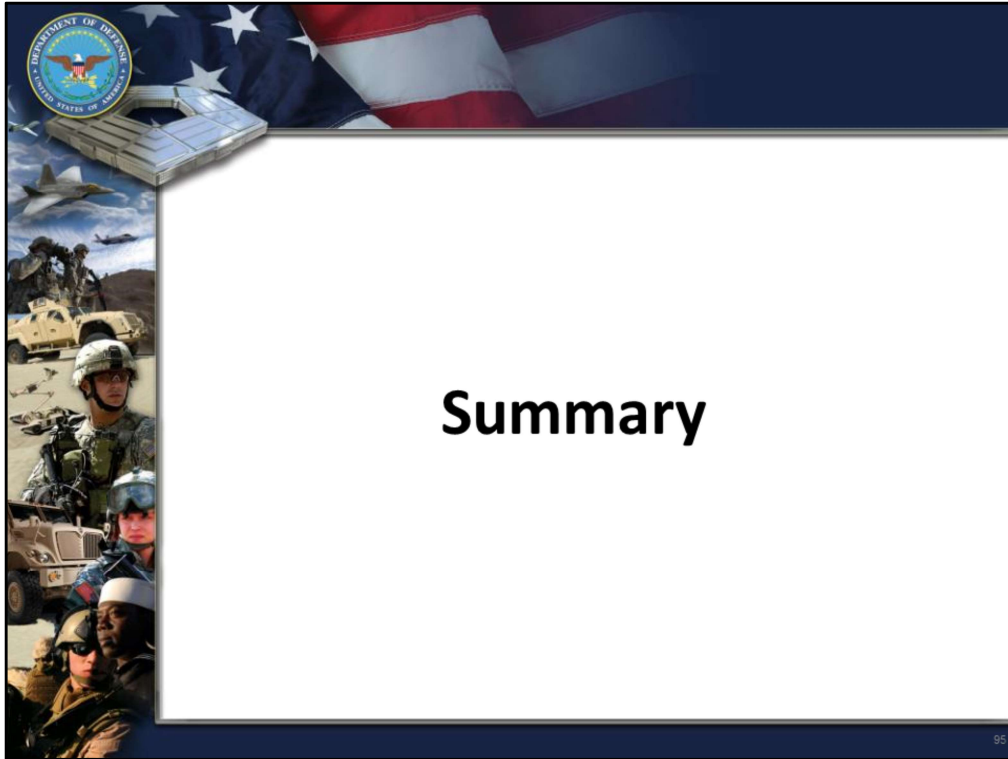
- Tailored responses
- Top level pricing summaries
- Historical prices
- Explanation of significant difference between actual contract price and estimated LOA price

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The DFARS essentially restates SAMM policy. If the purchaser requests additional information concerning FMS contract prices, the contracting officer shall, after consultation with the contractor, provide sufficient data to demonstrate the reasonableness of the price and provide reasonable responses to relevant questions concerning contract price.

This may include tailored responses, top level pricing summaries, historical prices, or an explanation of any significant differences between the actual contract prices and the estimated contract price included in the initial LOA price.

Responses may be provided orally, in writing or by any other method acceptable to the contracting officer.



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Summary

- Contracting for FMS is more than just purchasing items & services
- FMS leverages DoD's acquisition infrastructure to:
 - Promote strategic relationships
 - Achieve national security (DoD) and foreign policy (DoS) objectives
 - Provide enabling capabilities to partners for the common defense
- FMS value does not begin at contract delivery, it includes the procurement process itself
- Contracting Officers are essential enablers to successful FMS program development, execution and closure

A primary theme in both part 1 and 2 of this learning guide has been to emphasize that the contracting officer's role in FMS is more than just buying items and services. For the DoD, the FMS acquisition process itself presents a strategic opportunity to leverage DoD's acquisition infrastructure to promote international defense relationships, achieve national security and foreign policy goals and to provide our partners enabling defense capabilities that mutually benefit both the U.S. and the partner nation.

These FMS benefits do not just begin to accrue at the point of physical contract delivery. The benefits actually have the potential to begin within the acquisition process itself. The willingness of the contracting community to permit international partner representatives to become involved in the DoD acquisition process, to the extent permitted by DFARS 225.7304, generates value to the customer and contributes towards a positive view of the USG as a defense supplier within the competitive global defense market.

Contracting officers are essential enablers to successful FMS programs. Contracting officers provide key information during LOA development that helps establish realistic international purchaser expectations. Subsequently, successful LOA execution is largely dependent upon the knowledge, skills and experience of the contracting officer and the entire acquisition team. Last, timely and accurate LOA closure relies on the contracting officer's contract administration activities to ensure proper contract payments and maintenance of residual unliquidated obligations (ULOs) associated with FMS requirements.



Questions

Submit to:

ISCS “Ask an Instructor”

<http://www.iscs.dsca.mil/aai/>

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Thank you for taking the time to find out more information about “Contracting for FMS”.

If you have questions about “Contracting for FMS”, submit them to ISCS through the “Ask an Instructor” program.

If you know other contracting personnel that work with FMS requirements, please refer them to this learning guide.